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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

ROBERT CHARLES ROOS IV,

Petitioner,

vs.

BANCFIRST OF SULPHUR, OKLAHOMA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether a judgment against a purported partnership in a state court action, rendered while an alleged general partner thereof was in bankruptcy and protected by the automatic stay imposed by 11 U.S.C. 362, is void as to, and ineffective against, the alleged general partner and can therefore not be enforced against the alleged general partner after the bankruptcy is dismissed and the automatic stay is terminated.

II. Whether bankruptcy law alters the general rule of nonbankruptcy law that a judgment against a partnership renders a general partner personally liable if the partnership assets are not sufficient to satisfy the judgment.

PARTIES TO THE PROCEEDING

Petitioner is Robert Charles Roos, IV. Respondent BancFirst of Sulphur is the successor to First Oklahoma Bank & Trust Company of Sulphur, Oklahoma. The following are the other parties who, while not parties to this petition for certiorari, were parties at one time or another to the proceedings below:

The Ruby Louise Roos Trust, the Robert Charles Roos, IV Trust and the Elizabeth Ann Roos Trust, by and through R. Charles Roos, III, Trustee;

R. Charles Roos, III;

Ruby Louise Roos Whittenburg; and

Elizabeth Ann Roos Engelman.

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REFERENCE TO OPINIONS RENDERED BY COURTS BELOW

The judgment by the Murray County, Oklahoma District Court against the purported partnership, Roos Trust, is not reported. See Appendices A and B. The decision of the Murray County, Oklahoma District Court denying the motion to vacate is not reported. See Appendices C and D. The decision of the Oklahoma Court of Appeals affirming the Murray County, Oklahoma District Court's denial of the motion to vacate is not reported. See Appendix E. The decision of the Oklahoma Supreme Court denying Petitioner's petition for writ of certiorari seeking review of the Oklahoma Court of Appeals' decision is not reported. See Appendix F.

JURISDICTIONAL STATEMENT

The Murray County, Oklahoma District Court entered judgment against a purported partnership, Roos Trust, on January 19, 1988. This judgment was memorialized in a journal entry filed March 1, 1988. The Murray County, Oklahoma District Court denied the motion to vacate on May 21, 1991. The formal order memorializing this decision was filed on June 28, 1991. The decision of the Oklahoma Court of Appeals affirming the Murray County, Oklahoma District Court's denial of the motion to vacate was filed on August 25, 1992. The order of the Oklahoma Supreme Court denying the petition for writ of certiorari was entered and filed on February 1, 1993.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS

Section 101 of the Bankruptcy Code of 1978, 11 U.S.C. § 101:

§ 101. Definitions

In this title --

. . .

(5) "claim" means --

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Section 362 of the Bankruptcy Code of 1978, 11 U.S.C. § 362:

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of --

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other

action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . .

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

. . .

(c) Except as provided in subsections (d), (e), and (f) of this section --

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of --

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

STATEMENT OF THE CASE

Respondent commenced this proceeding in 1985 by filing an action in the Murray County, Oklahoma District Court (the "Murray County Court") against R. Charles Roos, III ("Roos III"), as Trustee of three named trusts, on a November, 1984 promissory note (the "Murray County Action"). In April, 1986, Respondent sought, and was granted, leave to add two additional defendants. The first was Roos III in his individual capacity. The second was Roos Trust which Respondent claimed was a partnership whose general partners were allegedly Petitioner and his two sisters. Answers were filed on behalf of Roos III, as Trustee, and the purported partnership denying that the purported partnership existed or that Petitioner was a partner thereof.

On September 29, 1986, Respondent moved for summary judgment. On September 30, 1986, the Murray County Court gave Respondent summary judgment against Roos III, both as Trustee and individually, but denied Respondent's motion insofar as it sought a determination that Petitioner and his two sisters were partners of the purported partnership or that the purported partnership was liable to Respondent on the note.

In February, 1987, Petitioner and his wife filed a petition under Chapter 12 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Oklahoma.

On December 16, 1987, Respondent renewed its motion for summary judgment in the Murray County Action. Respondent again sought a determination that Petitioner was a general partner of the purported partnership and that the purported partnership was liable to Respondent on the note. At the time it renewed its motion, Respondent was aware of Petitioner's bankruptcy but did not seek to lift or modify the automatic stay to allow it to proceed against Petitioner in the state court action.

On January 19, 1988, at which time the automatic stay had not been modified or lifted, the Murray County Court awarded Respondent judgment against the purported partnership. Certiorari Appendix ("Cert. App.") at A-1. The Murray County Court specifically found that Petitioner was a general partner of the purported partnership. Cert. App. at A-1; A-3 - A-4. Under Oklahoma law, this established contingent liability against Petitioner, a fact Respondent conceded in its appellate briefs in the lower court.

On February 5, 1988, the bankruptcy court entered an order stating that because Petitioner had been unable to gain confirmation of a plan of reorganization, the case would be dismissed if Petitioner did not convert to a Chapter 7 within fifteen days. Petitioner did not convert to a Chapter 7 and, on June 20, 1988, the bankruptcy court entered an order closing Petitioner's bankruptcy case.

In January, 1991, at the trial of a separate action against Petitioner's mother, Respondent revealed, for the first time, that it believed it could, and that it intended to, enforce the January 19, 1988 judgment against Petitioner. As a result, on April 25, 1991, Petitioner filed a motion to vacate the January 19, 1988 judgment in the Murray County Action. Cert. App. at A-14. In this motion and the supporting brief, Petitioner raised the federal question sought to be reviewed here -- that because the January 19, 1988 judgment against the purported partnership established liability against Petitioner while he was in bankruptcy, rendition of that judgment violated the automatic stay, was void, and should be vacated. Cert. App. at A-14 - A-15; A-18 - A-19.

On May 21, 1991, the Murray County Court entered its order stating, "The motion to vacate judgment is denied as tothe [sic] partnership. The motion for summary judgment was proper." Cert. App. at A-5. The Murray County Court did not address Petitioner's argument that because the judgment against the purported partnership with the finding Petitioner was a partner thereof also established liability against Petitioner while he was in bankruptcy, the judgment

was void and unenforceable, at least as to Petitioner. See Cert. App. at A-4; A-6.

On June 20, 1991, Petitioner timely perfected his appeal of the Murray County Court's May 21, 1991 order. In his appeal brief, Petitioner again raised the federal question sought to be reviewed here, arguing that the January 19, 1988 judgment and its consequent establishment of liability against Petitioner violated the automatic stay and thus were void. Cert. App. A-27 - A-28; A-29 - A-30; A-32 - A-37.

Respondent conceded in its response to Petitioner's appeal brief that the January 19, 1988 judgment, taken while Petitioner was in bankruptcy, did indeed establish contingent liability against Petitioner. Respondent, nevertheless, argued that (despite the plain language of 11 U.S.C. §§ 101(5)(A) and 362(a)(1), (6)) establishing contingent liability against Petitioner in a state court proceeding while he was in bankruptcy did not violate the automatic stay and, further, that the liability established while Petitioner was in bankruptcy could be enforced against Petitioner when the automatic stay terminated upon the dismissal of Petitioner's bankruptcy case.

On August 25, 1992, the Oklahoma Court of Appeals affirmed the Murray County Court's denial of the motion to vacate, holding that the judgment against the purported partnership was proper. The Court of Appeals further held that it was also proper to establish contingent liability against Petitioner while he was in bankruptcy and that the contingent liability established while Petitioner was in bankruptcy could be enforced once Petitioner's bankruptcy case was dismissed and there was no stay to prevent the execution against Petitioner's personal estate to satisfy the judgment against the purported partnership. Cert. App. at A-9 - A-11.

Petitioner filed a timely petition for certiorari in the Oklahoma Supreme Court. Petitioner once again raised the federal question sought to be reviewed here, arguing that the automatic stay prohibited and rendered void any act that would establish liability (even contingent liability) against

Petitioner while he was in bankruptcy. Cert. App. at A-39 - A-40; A-41 - A-45. The Oklahoma Supreme Court denied certiorari on February 1, 1993. Cert. App. at A-12.

REASONS FOR GRANTING REVIEW

I. THE OKLAHOMA COURT'S HOLDING THAT RESPONDENT COULD ESTABLISH CONTINGENT LIABLILITY AGAINST PETITIONER WHILE HE WAS IN BANKRUPTCY IS CONTRARY TO THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE, CONTRAVENES CONGRESS' INTENT THAT THE AUTOMATIC STAY BE BROADLY INTERPRETED TO PROTECT THE DEBTOR AND CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, UNITED STATES COURTS OF APPEALS AND OTHER STATE COURTS OF LAST RESORT.

The Bankruptcy Code expressly prohibits "the ... continuation ... of a judicial ... proceeding against the debtor ... to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case ..." and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case ...." 11 U.S.C. 362(a)(1), (6). "Claim" is defined as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . .." 11 U.S.C. § 101(5)(A).

Congress' intent in enacting these provisions is set forth in the legislative history of the Bankruptcy Reform Act of 1978. In discussing the definition of a "claim," Congress stated:

> The definition is any right to payment, whether or not reduced to judgment,

> liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. The definition also includes as a claim an equitable right to performance that does not give rise to a right to payment. By this broadest possible definition and by the use of the term throughout the title 11, especially in subchapter I of chapter 5, the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.

S. Rep. No. 95-989, 95th Cong., 2d Sess. 22, reprinted in 1978 U.S. Code Cong. & Ad. News 5787, 5808; H.R. Rep. No. 95-595, 92d Cong., 2d Sess. 309, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6266.

Both this Court and a number of United States courts of appeals have held that Congress intended that "claim" be given the broadest possible definition. Johnson v. Home State Bank, 501 U.S. __, 115 L.Ed.2d 66, 74, 76 (1991); Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 558 (1990); Ohio v. Kovacs, 469 U.S. 274, 279 (1985); In re Hemingway Transport, Inc., 954 F.2d 1, 8 (1st Cir. 1992); Grady v. A.H. Robins Co., 839 F.2d 198, 200 (4th Cir.), cert. dismissed, 487 U.S. 1260 (1988); In re Remington Rand Corp., 836 F.2d 825, 829 (3d Cir. 1988); In re Christian Life Center, 821 F.2d 1370, 1375 (9th Cir. 1987); In re Robinson, 776 F.2d 30, 34-35 (2d Cir. 1985), rev'd on other grds., 479 U.S. 36 (1986); see also In re Johns-Manville, 57 B.R. 680, 686-87 (S.D.N.Y. 1986). "Claim" has been held to include contingent liability. Hemingway, 954 F.2d at 8; Grady, 839 F.2d at 200-03; Christian Life Center, 821 F.2d at 1375; In re Black, 70 B.R. 645, 646-51 (Bankr. D. Utah

1986); Acevedo v. Van Dorn Plastic Machinery Co., 68 B.R. 495, 497-98 (Bankr. E.D.N.Y. 1986).

> With respect to the automatic stay, Congress stated: The filing of a bankruptcy petition or any other petition commencing a case under this title automatically stays the enforcement of any lien against the debtor's property or to recover any claim owed by the debtor.

S. Rep. No. 95-989 at 4, reprinted in 1978 U.S. Code Cong. & Ad. News at 5790.

> Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions and all proceedings even if they are not before governmental tribunals.
>
> . . .
>
> Paragraph (6) prevents creditors from attempting in any way to collect a prepetition debt.

S. Rep. No. 95-989 at 50, reprinted in 1978 U.S. Code Cong. & Ad. News at 5836; see H.R. Rep. No. 95-595 at 340-41, reprinted in 1978 U.S. Code Cong. & Ad. News at 6297-98.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressure that drove him into bankruptcy.

S. Rep. No. 95-989 at 54-55, reprinted in 1978 U.S. Code Cong. & Ad. News at 5840-41; H.R. Rep. No. 95-595 at 340-41, reprinted in 1978 U.S. Code Cong. & Ad. News at 6296-97; see, e.g., Midlantic Nat'l Bank v. New Jersey Dept. of Env't Protection, 474 U.S. 494, 503, reh'g denied, 475 U.S. 1090 (1986); In re Smith, 876 F.2d 524, 525-26 (6th Cir. 1989).

The United States courts of appeals which have addressed the question have held that the scope of the automatic stay imposed by 362 is broad and that the automatic stay was intended to prevent creditors from attempting in any way to collect a pre-petition debt. E.g., Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1203 (3d Cir. 1991); Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354, 356 (10th Cir. 1991); SBA v. Rinehart, 887 F.2d 165, 167-68 (8th Cir. 1989); Morgan Guar. Trust Co. v. American Sav. & Loan Ass'n, 804 F.2d 1487, 1491 (9th Cir. 1986), cert. denied, 482 U.S. 929 (1987); In re Hellums, 772 F.2d 379, 381 (7th Cir. 1985); see also In re McGinty, 119 B.R. 290, 296 (Bankr. M.D. Fla. 1990) ("There is hardly any doubt that any action to impose a personal liability or to collect a pre-petition claim against a Debtor is prohibited by the automatic stay . . .").

In Kalb v. Feuerstein, 308 U.S. 433 (1940), this Court held that judicial proceedings undertaken in violation of the automatic stay are ineffective and are void ab initio. Id. at 438-39.

Eight of the nine United States Courts of Appeals that have addressed the issue have likewise held that acts and judicial proceedings in violation of the automatic stay are void. Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1206 (3d Cir. 1991) (citing Kalb); In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992); ICC v. Holmes Transp., Inc., 931 F.2d 984, 987-88 (1st Cir. 1991); Ellis v. Consolidated Diesel Elec. Corp., 894 F.2d 371, 372 (10th Cir. 1990) (citing Kalb); In re Smith, 876 F.2d 524, 526 (6th Cir. 1989); In re 48th Street Steakhouse, Inc., 835 F.2d 427, 431 (2d Cir. 1987), cert. denied, 485 U.S. 1035 (1988); Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984); Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11th Cir. 1982) (citing Kalb).[1]

A number of state courts of last resort, including the Oklahoma Supreme Court, have similarly held that acts done in violation of the automatic stay provision of the Bankruptcy Code are void and without effect. Butzloff v. Quandt, 397 N.W.2d 159, 160 (Iowa 1986); United Northwest Fed. Credit Union v. Arens, 664 P.2d 811, 813 (Kan. 1983); Overbey v. Murray, 569 So.2d 303, 306-07 (Miss. 1990) (citing Kalb); Bailey v. Campbell, 829 P.2d 667, 673 (Okla. 1991); Continental Casing Corp. v. Samedan Oil Corp., 751 S.W.2d 499, 501 (Tex. 1988) (citing Kalb).

Under Oklahoma law, a judgment against the partnership renders a general partner personally liable if the partnership assets cannot satisfy the judgment. Southard v. Oil Equip. Corp., 296 P.2d 780, 784 (Okla. 1956); Fowler v. Brooks, 146 P.2d 304, 307 (Okla. 1944); Taylor v. Quinnett, 235 P. 214, 214 (Okla. 1925) (syl. 2). The court below expressly recognized this. Cert. App. at A-7 - A-8.

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[1]Only the Fifth Circuit has held that actions undertaken in violation of the automatic stay are merely voidable rather than void. E.g., Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir. 1990); Sikes v. Global Marine, Inc., 881 F.2d 176, 178 (5th Cir.), reh'g denied, 888 F.2d 1388 (5th Cir. 1989). Petitioner could not find any decisions from the D.C., Fourth, or Federal Circuits on this issue.

The January 19, 1988 judgment against the purported partnership, which was rendered while Petitioner was in bankruptcy, included a specific finding that Petitioner was a partner of the purported partnership. That judgment therefore established contingent liability against Petitioner while he was in bankruptcy.

The court below, nonetheless, held that the January 19, 1988 judgment did not violate the stay and that the January 19, 1988 judgment is valid as to, and enforceable against, Petitioner. The opinion of the court below is thus contrary to the plain language of §§ 101(5)(A) and 362(a)(1), (6) and the legislative purpose behind those provisions, and conflicts with decisions of this Court, United States courts of appeals, and other state courts of last resort which hold that any act to establish liability, including contingent liability, against a debtor on a pre-petition debt while he is in bankruptcy violates the automatic stay and is void.

The court below cited the general rule that the automatic stay is available only to the debtor and reasoned that the stay did not apply because the action was solely against the purported partnership, a non-debtor, and not Petitioner. This reasoning ignores the effect of the January 19, 1988 judgment on Petitioner.

The Second and Fourth Circuits and numerous lower federal courts recognizing exceptions to the general rule and holding that the automatic stay does indeed operate to stay proceedings against non-debtors in circumstances where there is such an identity between the debtor and the non-debtor that the debtor is the real party defendant and a judgment against the non-debtor would therefore effectively be a judgment or finding against the debtor; where the action against the non-debtor would inevitably have an adverse impact on the debtor or the bankruptcy estate; where the judgment in the action against the non-debtor would be binding on the debtor or would expose the debtor to the risk of being collaterally estopped from raising issues that were litigated in the action against the non-debtor; or where the

liability of the debtor and the non-debtor is inseparable. In re 48th Street Steakhouse, 835 F.2d 427, 431 (2d Cir. 1987); In re S.I. Acquisition, Inc., 817 F.2d 1142, 1147-49 (5th Cir. 1987); A.H. Robins Co. v. Piccinin, 788 F.2d 994, 999-1001 (4th Cir.), cert. denied, 479 U.S. 876 (1986); In re North Star Contracting Corp., 125 B.R. 368, 370-71 (S.D.N.Y. 1991); In re Lomas Financial Corp., 117 B.R. 64, 68 (S.D.N.Y. 1990); In re Neuman, 128 B.R. 333, 336-37 (Bankr. S.D.N.Y. 1991); In re Kanawha Trace Dev. Partners, 87 B.R. 892, 896-97 (Bankr. E.D. Va. 1988); In re MacDonald/Associates, Inc., 54 B.R. 865, 867-70 (Bankr. D.R.I. 1985); In re Lion Capital Group, 44 B.R. 690, 702-04 (Bankr. S.D.N.Y. 1984); Seybolt v. Bio-Energy of Lincoln, Inc., 38 B.R. 123, 126-28 (Bankr. D. Mass. 1984); In re Johns-Manville Corp., 26 B.R. 420, 425-31 (Bankr. S.D.N.Y. 1983), aff'd, 40 B.R. 219 (S.D.N.Y. 1983), rev'd in part on other grds., 41 B.R. 926 (S.D.N.Y. 1984); see In re Rubenstein, 105 B.R. 198, 201-02 (Bankr. D. Conn. 1989); In re Metal Center, Inc., 31 B.R. 458, 462 (Bankr. D. Conn. 1983).

The court below expressly recognized that even though the January 19, 1988 judgment was against the purported partnership rather than Petitioner, it was binding on Petitioner. Cert. App. at A-7 - A-8. The decision of the court below is therefore in conflict with applicable decisions of both the Second and Fourth Circuit Courts of Appeals as well as numerous other lower federal courts.

Finally, the court below recognized that the January 19, 1988 judgment could not be enforced against Petitioner while he was in bankruptcy. Cert. App. at A-8. The court below, however, then went on to hold that the judgment could be enforced against Petitioner once his bankruptcy was dismissed and the stay was terminated. Id. This holding conflicts with the Tenth Circuit Court of Appeals' holding in Ellis that an action which is undertaken in violation of the stay and is therefore void is not validated by the subsequent lifting or termination of the automatic stay. 894 F.2d at 373; see also In re Randall Enterprises, Inc., 115

B.R. 292, 295 (Bankr. D. Colo. 1990); Bailey, 829 P.2d at 674.

The holding of the court below that Respondent could, while Petitioner was in bankruptcy, establish ontingent liability against Petitioner which Respondent could later enforce against Petitioner when the automatic stay was terminated is contrary to the plain language of the Bankruptcy Code, the congressional purpose underlying the Bankruptcy Code and applicable decisions of this Court, United States courts of appeals and other state courts of last resort. Petitioner submits that certiorari is therefore proper, and should be granted, pursuant to Supreme Court Rule 10.1(b), (c).

II. THIS COURT HAS NOT ADDRESSED THE QUESTION OF WHETHER BANKRUPTCY LAW WOULD ALTER THE GENERAL RULE OF NONBANKRUPTCY LAW THAT A JUDGEMENT AGAINST A PARTNERSHIP IS BINDING UPON A PARTNER.

The court below has, by implication, decided that bankruptcy law has no effect on the general rule of Oklahoma law that a judgment against a partnership imposes liability on a general partner. There are, however, decisions from the United States Bankruptcy Court for the District of Connecticut which Petitioner submits are applicable here and should alter that general rule.

In In re Metal Center, Inc., 31 B.R. 458 (Bankr. D. Conn. 1983), a creditor obtained a judgment against a guarantor who was not in bankruptcy even though the principal debtor, who was in bankruptcy, had objected to the underlying debt. The court noted that under non-bankruptcy law, the bankrupt principal debtor would be precluded by the judgment in the state court action from contesting the validity of the underlying debt in a later action. 31 B.R. at 462-63.

The court then found, however, that bankruptcy law altered that result:

> The question then is whether bankruptcy law alters this result. Following the logic that the automatic stay is intended to bar litigation against the debtor and the debtor's estate to collect prepetition debts, and armed with the assumption that the law would not permit an indirect result which was expressly barred, a debtor, on notice of an action by his creditor against his guarantor, might justifiably decline to join that litigation on the basis that the automatic stay must be read to protect him and his estate from being drawn into litigation or from being bound by the results thereof. Since he cannot be compelled to appear in the nonbankruptcy court to defend his creditor's or guarantor's claim, absent relief from the automatic stay, principles of law, which might otherwise bind the debtor, are of no effect in a bankruptcy context.

Id. at 463.

The decision in In re Rubenstein, 105 B.R. 198 (Bankr. D. Conn. 1989), is similarly applicable. There, the State Court Committee of Sale (the "Committee") brought a state court action against a mortgagee bank to collect costs it incurred when its attempts to sell the mortgagors' property were thwarted by the mortgagors' filing bankruptcy. The Committee argued that, under state law, the bank was liable for the costs of the aborted sale and that the Committee sought only to collect the debt owed by the bank, not any obligation of the bankrupt mortgagors. 105 B.R. at 200-01. The bank responded that the automatic stay barred the Committee's action against the bank because, under state law and the terms of the mortgage, the bankrupt mortgagors were ultimately liable to the bank for those costs and that a

judgment against the bank in the state court action would be binding upon the bankrupt mortgagors. Id. at 201.

The Court noted that while, under state court law, this would normally be true, the mortgagors' filing their bankruptcy petition changed that result:

> A judgment is binding upon a third person who is liable to the judgment debtor when that third person has notice of and an opportunity to defend against the cause of action. Bankruptcy alters that result.
>
> . . .
>
> Accordingly, I conclude that the debtor would not be bound by any judgment that the Committee might obtain against the Bank in state court . . ..

Id. at 202.

The question of whether a creditor can, by taking a judgment against a partnership while a general partner is in bankruptcy, do indirectly what it could not do directly because of the automatic stay -- establish liability against the general partner without seeking relief from the stay, is an important question of federal law which has not been, but Petitioner submits should be, settled by this Court. Petitioner submits that certiorari is therefore proper, and should be granted, pursuant to Supreme Court Rule 10.1(c).

REQUEST FOR SUMMARY REVERSAL

The law is so clear that liability, even contingent liability, could not be established against Petitioner while he was in bankruptcy and protected by the automatic stay that summary reversal is warranted. The authorities which would be presented in a brief on the merits have been presented in

this Petition. Petitioner requests that this Court grant certiorari and summarily reverse and remand, based upon the obvious misconstruction of federal law reflected on the face of the decision below.

CONCLUSION

Petitioner, Robert Charles Roos IV, respectfully requests that this Court grant his Petition for Writ of Certiorari and review the decision of the Oklahoma Supreme Court.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By:_____
Graydon D. Luthey
James J. Proszek
4100 Bank of Oklahoma Tower
One Williams Center
Tulsa, Oklahoma 74172-0141
918-588-2700

ATTORNEYS FOR PETITIONER
ROBERT CHARLES ROOS, IV

APPENDIX

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APPENDIX A

IN THE DISTRICT COURT OF MURRAY COUNTY,
STATE OF OKLAHOMA

FIRST/OKLA. BANK & TRUST CO. PLAINTIFF(S)	)NO. C-85-147
VS	)Date 1-19-88
RUBY LOUISE ROOS TRUST, et al DEFENDANT(S)	)(Filed January 19, 1988)
VS	
ROOS TRUST, et al. 3rd Party Defs.	

COURT MINUTE

Re: Motion for Disposition of Pending Motion for Summary Judgment

Plf. apprs. by John B. Axton; Kenneth M. Smith, Atty. for Defs. apprs. not.

The Court finds that partial summ. judgment was granted as to R. Charles Roos III heretofore on 10-17-87; The Court further finds that in fact the Roos Trust is a partnership consisting of 3 individuals and the individuals being Ruby Louise Roos Whittenburg, Elizabeth Ann Roos Engleman, and Robert Charles Roos IV. The Court therefore grants the Motion for Summary Judgment against said partnership. John Axton to prepare J.E.

JUDGE OF THE DISTRICT COURT

APPENDIX B

IN THE DISTRICT COURT WITHIN AND FOR
MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA BANK & TRUST COMPANY OF SULPHUR, OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	Case No. 85-147
RUBY LOUISE ROOS TRUST, ROBERT CHARLES ROOS, IV, TRUST and ELIZABETH ANN ROOS TRUST, All by the Trust Instrument dated June 1, 1964, by and through R. CHARLES ROOS, III, Trustee,	)	(Filed March 1, 1988)
Defendants,	)	
vs.	)	
ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS, IV, and ELIZABETH ANN ROOS ENGELMAN; and R. CHARLES ROOS III, individually,	)	
Additional Party Defendants.	)	

SUPPLEMENTAL JOURNAL ENTRY OF JUDGMENT

Now on this 19th day of January, 1988, this matter comes on for hearing pursuant to its regular setting and notice for disposition as to Plaintiff's Summary Judgment against ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN. The Court verifies that in addition to the mailing by the Plaintiff to the Defendant's attorney, the Court Clerk certifies that Notice of the Motion Docket and setting of this matter was mailed by the Court Clerk to Defendant's attorney, Mr. Kenneth Smith. The Plaintiff appears by and through its attorney, John B. Axton of the firm of Mayhue & Axton, and the Defendant appears not. The Court having reviewed the Motions, Responses, Affidavits and Exhibits attached thereto and being fully advised in the premises finds that the Motion should be sustained and Judgment entered in favor of the Plaintiff and against the Defendant, ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN. The Court has jurisdiction and venue of the parties and the subject matter.

The Court further finds that it has heretofore on September 30, 1986, entered judgment in favor of the Plaintiff against the Defendants, R. CHARLES ROOS III, individually; R. CHARLES ROOS III as Trustee for RUBY LOUISE ROOS TRUST, ROBERT CHARLES ROOS IV TRUST, and ELIZABETH ANN ROOS TRUST, which judgment is ratified and reaffirmed.

The Court finds and IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. That ROOS TRUST is a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN.

2. That RUBY LOUISE ROOS is one and the same person as RUBY LOUISE ROOS WHITTENBURG. ELIZABETH ANN ROOS is one and the same person as ELIZABETH ANN ROOS ENGELMAN.

3. That ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN is liable on the note and indebtedness owed to the Plaintiff as set forth in Plaintiff's Petition and that ROOS TRUST, a partnership, has utilized and benefitted from the use of the proceeds on the note upon which suit was filed.

4. That the Plaintiff is awarded a summary judgment pursuant to Rule 13 of the Rules of the District Court, against ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN, in the amount of $465,179.45 as of January 19, 1988, with interest thereon at the rate of 14.5% per annum, and a reasonable attorneys fee.

5. That the Plaintiff is entitled to recover a reasonable attorney fee and its costs upon filing a proper Motion with an Affidavit of services attached thereto.

Judge of the District Court

APPROVED:

_____

JOHN B. AXTON, OBA #389
Attorney for Plaintiff
P. O. Box 1388
Ada, OK 74820
405-332-7200

APPENDIX C

IN THE DISTRICT COURT OF MURRAY COUNTY,
STATE OF OKLAHOMA

FIRST OKLAHOMA BANK AND TRUST CO. PLAINTIFF(S)	) NO C-85-147
VS.	) DATE May 21st, 1991
RUBY LOUISE ROOS, et al., DEFENDANT(S)	) JUDGE COLBERT) COURT REPORTER) _____

(Filed May 21, 1991)

COURT MINUTE

This matter comes on for hearing on Motion To Vacate Judgment filed by the Defendants. John Axton appears for the Plaintiff. Kenneth Mather and Phil Hurst appears on behalf of the Defendants. The motion to vacate judgment is denied asto [sic] the partnership. The motion for summary judgment was proper. Due to lack of service on partners, Elizabeth Roos Engleman and Ruby Louise Roos Whittenberg, judgment vacated as to their interest in the partnership. John Axton to prepare a J.E.

Court Clerk to give copy of minute to all parties.

JUDGE OF THE DISTRICT COURT

APPENDIX D

IN THE DISTRICT COURT IN AND FOR MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA	)	
BANK & TRUST	)	
COMPANY, merged into	)	
BancFirst, Sulphur,	)	
Oklahoma, a banking	)	
corporation,	)	
	)	
vs.	)	C-85-147
	)	
RUBY LOUISE ROOS,et al	)	(Filed June 28, 1991)

ORDER

Now on this 21st day of May, 1991, this matter comes on for hearing on a Motion to Vacate Judgment filed by the Defendants. Plaintiff appears by and through its attorney John B. Axton and the moving Defendants appear by and through their attorneys Kenneth Mather and Phil Hurst. The Court having reviewed the file and heard argument of counsel Finds, Orders, Adjudges and Decrees as follows:

1. That the Motion to Vacate Judgment as to the partnership is hereby denied for the reason that the Motion for Summary Judgment heretofore entered was proper.

2. That the Motion to Vacate Judgment as to Elizabeth Roos Engleman and Ruby Louise Roos Whittenberg, partners, is sustained due to a lack of valid service and there is no

personal liability on Elizabeth Roos Engleman and Ruby Louise Roos Whittenberg for the debt of the partnership.

Judge of the District Court

APPROVED:

JOHN B. AXTON, OBA #389
Attorney for Plaintiff

KENNETH MATHER
Attorney for Defendants

APPENDIX E

RELEASE FOR PUBLICATION
BY ORDER OF COURT OF APPEALS

THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

Division III

BANCFIRST, successor to FIRST OKLAHOMA BANK & TRUST CO. OF SULPHUR, OKLAHOMA, Appellee,	)	
versus	)	Case Number 77,768
RUBY LOUISE ROOS TRUST, ROBERT CHARLES ROOS, IV, TRUST and ELIZABETH ANN ROOS TRUST, all by the Trust Instrument dated June 1, 1964, by and through R. CHARLES ROOS, III, Defendants,	)	(Filed Aug. 25, 1992)
and	)	
ROOS TRUST, a Partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS, IV, and ELIZABETH ANN ROOS ENGLEMAN; and R. CHARLES ROOS, III, Individually, Additional Party Defendants,	)	
ROBERT CHARLES ROOS, IV, Appellant.	)	

APPEAL FROM THE DISTRICT COURT OF MURRAY COUNTY, OKLAHOMA

HONORABLE TIM COLBERT, JUDGE

AFFIRMED

John B. Axton,
Ada, Oklahoma
For Appellee,

Kenneth G.M. Mather,
Tulsa, Oklahoma,
For Appellant.

MEMORANDUM OPINION

Opinion by Stewart M. Hunter, Judge:

Robert Charles Roos, IV, Appellant brings this appeal from the trial court's denial of his Motion to Vacate Judgment. He alleges that a judgment entered against the Roos Trust, a partnership, of which he was general partner, was void as to him because when entered on March 1, 1988, he was in Chapter 12 Bankruptcy. It is his position that the stay effected by 11 U.S.C. § 362 to protect a debtor's estate in bankruptcy invalidated any state court judgment against a partnership of which the debtor was a general partner. He contends that the judgment was void and should be vacated according to 12 O.S. 1991, § 1038.

We find Appellant's position groundless and affirm the trial court's holding that a judgment was enforceable against the general partner whose estate was no longer under the jurisdiction of the bankruptcy court.

BancFirst, Appellee, originally commenced its action to collect the debt of approximately $465,000.00 on July 25, 1985. On April 8, 1986, Appellee filed a motion to include as an additional party defendant the Roos' Trust, a partnership composed of three individuals, one of which was Appellant. On February 6, 1987, Appellant, as an individual, filed a voluntary Chapter 12 Bankruptcy Petition. After being advised that Appellant was in bankruptcy, the trial court entered a Supplemental Journal Entry on January 19, 1988, giving BancFirst judgment only against the Roos' Trust, a partnership entity. On June 20, 1988, Appellant's bankruptcy action was dismissed because no confirmable plan could be submitted. On April 25, 1991, Appellant filed a Motion to Vacate the January 19, 1988, judgment against the Roos' Trust contending that it was invalid because taken in violation of the bankruptcy stay.

A partnership is a distinct entity from the individuals who compose it. Partners as such are not directly or personally liable on a debt or liability of the partnership. Their liability arises out their connection with the firm. Southard v. Oil Equipment Corporation, 296 P.2d 780, 784 (Okl. 1956). It would be error to render a personal judgment against a partner for a partnership debt. Id.

It is a primary rule of bankruptcy law that partnerships are separate and distinct legal entities from the partners for bankruptcy purposes, and their assets are separate and distinguishable. In re Dreske, 25 B.R. 268 (1982). The stay effected when a general partner files a Bankruptcy Petition does not extend to the partnership entity nor to partnership assets. In re Minto Group, Inc., 46 B.R. 222 (9185).

Because of the foregoing, we find the judgment against the partnership did not violate the stay protecting Appellant's personal estate effected by filing the Bankruptcy

Petition. See, Bailey v. Campbell, 829 P.2d 667 (Okl. 1991). While it is true that Appellant's personal estate could not be reached to satisfy the judgment as long as he was in bankruptcy, the stay did not foreclose Appellee's right to obtain a judgment against the partnership. Once the bankruptcy petition was dismissed, there was no stay to prevent execution against Appellant's personal estate to satisfy the partnership debt. The bankruptcy court had not discharged or otherwise disposed of Appellee's judgment as it related to Appellant. The trial court properly denied Appellants' Motion to Vacate the Judgment.

AFFIRMED.

HANSEN, V.C.J. and BAILEY, P.J. concur.

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BANCFIRST, Appellee,	)	
v.	)	No. 77,768
RUBY LOUISE ROOS TRUST and ROBERT CHARLES ROOS IV TRUST and through R. CHARLES ROOS III, Trustee, R. CHARLES ROOS III, individually, and ROOS TRUST, a partnership. Defendants,	)	
ROBERT CHARLES ROOS IV, Appellant.	)	(Filed Feb. 1, 1993)

ORDER

Upon consideration of the petition for certiorari in the above styled and numbered cause, THIS COURT FINDS:

1. Certiorari should be denied.

2. The opinion of the Court of Appeals should be withdrawn from publication. Rules of Appellate Procedure in Civil Cases, 12 O.S. 1991, ch. 15, App. 2, Rule 1.200(C)(B).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the petition for certiorari is denied and that the opinion of the Court of Appeals be withdrawn from publication.

DONE IN CONFERENCE this 1st day of February, 1993.

VICE CHIEF JUSTICE

VOTE TO DENY CERTIORARI:
ALL JUSTICES CONCUR

VOTE TO WITHDRAW PUBLICATION OF THE OPINION OF COURT OF APPEALS:
LAVENDER, V.C.J. SIMMS, HARGRAVE,
OPALA, WILSON, KAUGER, WATT, JJ., concur.
HODGES, C.J., SUMMERS, J., dissent.

APPENDIX G

IN THE DISTRICT COURT OF MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA BANK & TRUST COMPANY Sulphur, Oklahoma, a banking corporation, Plaintiff,	)	
v.	)	NO. 85-147
RUBY LOUISE ROOS TRUST, et al., Defendants,	)	
v.	)	
ROOS TRUST, a partnership, et al., Third Party Defendants.	)	(Filed April 25, 1991)

MOTION TO VACATE JUDGMENT

COMES NOW, the Defendants, Ruby Louise Roos Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman, pursuant to Okla. Stat. Tit. 12, 1031 et seq. (1991), and respectfully requests this Court to vacate the Judgment entered against the "Roos Trust", a purported partnership, on January 19, 1988, for the following reasons, to-wit:

1. The subject judgment was entered by default and, therefore, no adjudication of the existence of the purported partnership composed of the individual defendants herein known as the "Roos Trust" was ever made. To the contrary, no such entity has ever existed. Thus, the judgment

against the purported partnership is void as a matter of law and must be vacated.

2. The Judgment entered against Robert Charles Roos IV, one of the purported partners, was obtained subsequent to his filing for bankruptcy protection under Chapter 12 of the United States Bankruptcy Code by Robert Charles Roos IV, as Case No. 87-70148, U.S. Bankruptcy Court for the Eastern District of Oklahoma. During the pendency of said Chapter 12 proceedings, an automatic stay was in place preventing any further legal actions against the Debtor Robert Charles Roos IV. Indeed, the Plaintiff, First Oklahoma Bank and Trust Co., was a scheduled creditor of Robert Charles Roos IV and, therefore had notice of Mr. Roos IV's bankruptcy and automatic stay of proceedings against him. Despite this notice and automatic stay though, the Judgment in question was nevertheless obtained against Robert Charles Roos IV. As a matter of law, any Judgment obtained in violation of the automatic stay is void. Thus, the Judgment against Robert Charles Roos IV must be vacated.

3. Finally, two of the members of the purported partnership, specifically Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman, never received proper service of process or notice of the case against each of them or the judgment rendered in the present case. Thus, the judgment entered against either of these defendants is void as a matter of law and must be vacated. This is especially true in light of the fact that the suspect judgment was obtained by default without further notice to these defendants.

WHEREFORE, the above-premises considered, the Defendants, Ruby Louise Roos Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman respectfully requests this Court to vacate the Judgment entered against them on January 12, 1988.

Respectfully submitted,

Kenneth G. Mather, OBA #11916
3800 First National Tower
Tulsa, OK 74103-4309
(918) 581-8200

APPENDIX H

IN THE DISTRICT COURT OF MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA BANK & TRUST COMPANY Sulphur, Oklahoma, a banking corporation,	)	
Plaintiff,	)	
v.	)	NO. 85-147
RUBY LOUISE ROOS TRUST, et al.,	)	
Defendants,	)	
v.	)	
ROOS TRUST, a partnership, et al.,	)	
Third Party Defendants.	)	(Filed April 25, 1991)

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO VACATE JUDGMENT

The Motion of the Defendants, Robert Charles Roos IV, Ruby Louise Roos Whittenburg, and Elizabeth Ann Roos Engelman, to vacate the judgment entered against the Roos Trust on January 19, 1988, must be granted. The judgment against the Roos Trust was entered by default. Thus, there was no judicial adjudication concerning the existence of the

purported partnership consisting of the individual defendants herein. To the contrary, no such partnership exists. Consequently, any judgment against said partnership is necessarily logically impossible and void.

Next, during the pendency of the litigation in the instant case, and prior to the entry of the judgment against the Roos Trust, (which is nevertheless void since there is no partnership known as the "Roos Trust" consisting of the individual defendants herein), Robert Charles Roos IV filed his petition for protection under Chapter 12 of the United States Bankruptcy Code. Upon filing this petition, an automatic stay of proceedings against Robert Charles Roos IV was entered. Despite the Plaintiff's knowledge of the bankruptcy petition of Robert Charles Roos IV, and the concomitant automatic stay of proceedings against Robert Charles Roos IV, the Plaintiffs nevertheless obtained a judgment against Mr. Roos IV by virtue of the judgment against the partnership. As a matter of law, any action taken in violation of the automatic stay is void and without effect. 11 U.S.C.A. 362 (1990); Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371 (10th Cir. 1990)("any action taken in violation of (automatic) stay is void and without effect.")

Finally, the judgment against Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman is void because neither of these Defendants was ever properly served with a summons and/or notification of the proceedings against them. Thus, any judgment obtained by default against them is void. Okla.Stat.tit. 12, 1031 et seq. (1991).

ARGUMENT AND AUTHORITIES

There is no partnership between the individual Defendants known as the Roos Trust.

As previously stated, this Court entered judgment, by default, against an entity known as the "Roos Trust", which

allegedly was a partnership consisting of Ruby Louise Whittenburg, Elizabeth Ann Roos Engelman, and Robert Charles Roos IV, on January 19, 1988. This judgment was entered by default. There was no adjudication of the existence of the alleged partnership between the individual Defendants. To the contrary, no such entity exists. (See Affidavit of Robert Charles Roos IV, attached hereto as Exhibit "A"). Consequently, it is logically impossible that a judgment against a non-existent partnership is valid. Thus, the judgment entered against said purported partnership, is void and must be vacated.

Any action taken against Robert Charles Roos IV in violation of the automatic stay provided under the United States Bankruptcy Code is void and without effect.

Prior to the entry of the suspect judgment, Robert Charles Roos IV filed his petition for protection under Chapter 12 of the United States Bankruptcy Code. The filing of a petition for bankruptcy, immediately imposes an automatic stay of proceedings against the debtor. In the Tenth Circuit, and elsewhere, it has repeatedly been held that any action taken in violation of the automatic stay is void and without effect. 11 U.S.C.A. 362 (1990); Ellis v. Consol. Diesel Elec. Corp., Id. at 371. This rudimentary principle of bankruptcy law applies even where there is no actual notice of the existence of the stay. 11 U.S.C.A. 362(a) (1990); In re Calder, 907 F.2d 953 (10th Cir. 1990)("Ordinarily, any action taken in violation of (automatic) stay is void and without effect, even where there is no actual notice of existence of stay.") In the present case though, there was notice of the bankruptcy of Robert Charles Roos IV, and the concomitant stay of proceedings against him, because the Plaintiff herein, First Oklahoma Bank and Trust Co., was a scheduled creditor of Mr. Roos (Exhibit "A").

Despite these principles, and despite the actual knowledge of the pending bankruptcy of Robert Charles Roos IV, because of Plaintiff's participation in said bankruptcy, the Plaintiff nevertheless proceeded to obtain judgment against Mr. Roos IV. Further, said judgment was obtained even though the Plaintiffs never requested relief from the automatic stay from the United States Bankruptcy Court having jurisdiction over the Roos IV bankruptcy. Thus, the actions taken to obtain the suspect judgment constitute a violation of the automatic stay of proceedings against Mr. Roos IV as a matter of law under 11 U.S.C.A. 362 and the previously mentioned controlling cases. Consequently, the judgment in question must be vacated and the Defendant's motion must, therefore, be granted.

Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman never received service of process or notice of the present case, thus, any judgment taken against either of them is void and must be vacated.

Finally, the Defendants' Motion to Vacate Judgment must be granted because two of the Defendants, specifically Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman were never properly served with notice of the above styled case. Indeed, the pleadings index for the instant case reveals that both the original summons and alias summons issued to Ruby Louise Roos Whittenburg were returned unserved. The summons and alias summons for Elizabeth Ann Roos Engelman were also returned unserved. (See pleadings index attached hereto as Exhibit "B"). Thus, all available documentation leads to the same conclusion; that neither Ruby Louise Roos Whittenburg or Elizabeth Ann Roos Engelman were properly served with process and notice of the lawsuit against them and the subsequent judgment which was obtained in that same case. Consequently, as a

matter of law, said judgment is void and must be vacated by this Court. See Okla.Stat.tit. 12, 1031 et seq. (1991). Thus, the Defendants' Motion to Vacate must be granted.

CONCLUSION

The Defendants' Motion to Vacate judgment entered against the Roos Trust on January 19, 1988, must be granted for several reasons. First, the purported partnership against which the suspect judgment was entered does not exist. Second, the judgment was entered despite the existence of an automatic stay of proceedings against Robert Charles Roos IV, a purported partner of the non-existent partnership, and is therefore automatically void and without effect as a matter of law. Finally, two of the members of the purported partnership were never served with sufficient processes or notice of the claims against them and/or the judgment eventually entered in the case. Thus, the Defendants' Motion to Vacate Judgment must be granted.

Respectfully submitted,

JONES, GIVENS, GOTCHER & BOGAN,
a professional corporation

By:

Kenneth G.M. Mather, OBA #11916
Brent L. Mills, OBA# 13464
3800 First National Tower
(918) 581-8200

APPENDIX I

No. 77,768 (Filed November 26, 1991)

In the Supreme Court of The State of Oklahoma

BANCFIRST, successor to FIRST
OKLAHOMA BANK & TRUST COMPANY OF
SULPHUR, OKLAHOMA,

Appellee,

vs.

RUBY LOUISE ROOS TRUST,
ROBERT CHARLES ROOS, IV, TRUST,
and ELIZABETH ANN ROOS TRUST,
all by the Trust Instrument
dated June 1, 1964, by and through
R. CHARLES ROOS, III,

Appellants,

vs.

ROOS TRUST, a Partnership composed of
RUBY LOUISE ROOS WHITTENBURG,
ROBERT CHARLES ROOS, III, and
ELIZABETH ANN ROOS ENGLEMAN; and
R. CHARLES ROOS, III, Individually,

Appellants.

AN APPEAL FROM THE DISTRICT COURT OF
MURRAY COUNTY
STATE OF OKLAHOMA

BRIEF IN CHIEF OF DEFENDANT-APPELLANT
R. CHARLES ROOS IV

JONES, GIVENS, GOTCHER & BOGAN, P.C.
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INTRODUCTION

This appeal is taken from an order against Appellant, R. Charles Roos, IV, in favor of BancFirst, formerly known as First Oklahoma Bank and Trust Company of Sulphur, Oklahoma ("BancFirst"). The order denied Appellant's Motion to Vacate Judgment. Appellant's Motion to Vacate Judgment sought to vacate the void judgment previously entered by the trial court on March 1, 1988. The March 1, 1988 judgment is void as to R. Charles Roos, IV, because it was entered in violation of the automatic stay provision of 11 U.S.C. §362.

STATEMENT OF THE CASE

On July 26, 1985, BancFirst originally commenced its action by filing a petition in the District Court of Murray County, Oklahoma, (hereinafter referred to as the "State Court Action") seeking a money judgment. On April 8, 1986, BancFirst filed a Motion to Make Additional Party Defendants, requesting an order of the trial court making "Roos Trusts, a partnership composed of ... Robert Charles Roos, IV ... additional party defendants to this lawsuit." Notice of the Motion to Make Additional Party Defendants was not served upon the alleged individual partners, including R. Charles Roos, IV ("Mr. Roos").

On February 6, 1987, Mr. Roos filed a Voluntary Chapter 12 Bankruptcy Petition in the United States Bankruptcy Court for the Eastern District of Oklahoma. An automatic stay was imposed against the creditors of Mr. Roos and his property by virtue of 11 U.S.C. §362. Mr. Roos' Chapter 12 Bankruptcy proceeding continued uninterrupted from the filing date until the Final Decree closing the Chapter 12 bankruptcy case was entered on June 20, 1988.

During the pendency of Mr. Roos' bankruptcy proceeding, BancFirst violated the bankruptcy automatic stay by proceeding in the State Court Action. Without seeking

stay modification, BancFirst: (l) sought and obtained a hearing to establish liability against Roos Trusts and Mr. Roos individually as an alleged partner; (2) obtained a judgment against Roos Trust and its alleged partners on March 1, 1988; (3) attempted execution upon the void March 1, 1988 judgment. BancFirst's proof of claim filed in Mr. Roos' bankruptcy proceeding was based upon the results obtained in the State Court Action.

BancFirst's void March 1, 1988 Judgment against Mr. Roos individually was obtained without first seeking relief from the automatic stay provision of 11 U.S.C. 362. On April 25, 1991, Appellant filed a Motion to Vacate Judgment because the March 1, 1988 judgment was void as a matter of law pursuant to 11 U.S.C. §362. The trial court denied Appellant's Motion to Vacate Judgment and accordingly, Appellant filed his appeal with this Court.

ABSTRACT OF RECORD

A. MOTION TO MAKE ADDITIONAL PARTY DEFENDANTS DATED AND FILED APRIL 8, 1986 IN THE STATE COURT ACTION.

The Motion adds Charles Roos, IV, individually, as a partner of the Roos Trust to the pending action. Notice of the Motion was not sent to Mr. Roos, individually.

B. MOTION FOR DISPOSITION OF PENDING MOTION FOR SUMMARY JUDGMENT FILED DECEMBER 16, 1987 IN THE STATE COURT ACTION.

During Mr. Roos' bankruptcy, BancFirst filed a Motion for Disposition of the Pending Motion for Summary Judgment in the State Court Action. Therein, BancFirst recognized Mr. Roos' pending Chapter 12 Bankruptcy

proceeding and that the action was stayed as to Mr. Roos, individually.

Specifically, BancFirst's Motion for Disposition stated that its Motion for Summary Judgment was previously granted in part and held in abeyance as "...to judgment against Ruby Louise Roos Whittenburg, Elizabeth Ann Roos Engleman and Charles Roos, IV, as partners in a partnership called Roos Trust." After identifying its primary intent to obtain a judgment against the alleged partners individually, BancFirst went on to recognize:

> That Charles Roos, IV has filed Chapter 12 Bankruptcy in Case No. 87-00148-BKC-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, therefore these actions are stayed as to Charles Roos, IV, however, there is no action stayed against the Defendants, Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engleman. (Emphasis added.)

Finally, BancFirst's Motion for Disposition requested that a determination as to the "...liability of the partnership and the individuals, Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engleman, liability as partners." Despite this admission, incredibly BancFirst then proceeded to take judgment on March 1, 1988 against the Partnership, including Mr. Roos. The Judgment was taken in violation of the automatic stay.

C. SUPPLEMENTAL JOURNAL ENTRY OF JUDGMENT FILED MARCH 1, 1988.

The Supplemental Journal Entry of Judgment of March 1, 1988 (hereinafter the "Judgment"), granted BancFirst's Motion for Summary Judgment, to the extent relevant to Mr. Roos, against "Roos Trust, a partnership composed of...R. Charles Roos, IV..." This Judgment was

taken in violation of the automatic stay arising from Mr. Roos' Bankruptcy and accordingly is void as to Mr. Roos. No appearance was made at the hearing by Mr. Roos and the record lacks any evidence that Mr. Roos, individually, received notice of the hearing.

D. APPLICATION FOR ORDER TO DISCLOSE ASSETS FILED MAY 25, 1988.

On May 25, 1988, BancFirst applied for an Order for Roos Trust to Disclose Assets. This Application shows BancFirst's actions to execute on the Judgment against the partnership, and ultimately against Mr. Roos which violated the automatic stay imposed by Mr. Roos' Bankruptcy proceeding.

E. ORDER TO APPEAR AND ANSWER AS TO ASSETS FILED JUNE 3, 1988.

An Order to Appear and Answers as to Assets was entered on the above referenced application. The Order was entered prior to the closing of Mr. Roos' Bankruptcy and further evidences BancFirst's continuing violation of the automatic stay.

BancFirst's harrassment beyond the Judgment of Mr. Roos continued as it wrongfully exercised these post-judgment execution procedures. The Order to Appear and Answer as to Assets was directed against Mr. Roos, individually. The Order directed the Private Process Server to notify Mr. Roos to appear as follows:

> To the Defendant, R. Charles Roos, IV, partner of Roos Trust, it appearing to the Court by verified petition that the judgment entered in the above entitled cause has not been satisfied;

> It is by the Court ordered that you, be and appear in person...to answer regarding your ability to respond to the judgment and pay same.
>
> You, the Defendant, Robert Charles Roos, IV, Partner of Roos Trust, are hereby restrained and enjoined from mortgaging, encumbering, alienating, transferring or otherwise disposing of any property, except reasonable and necessary payment of expenses and indebtedness until further Order of this Court. (Emphasis added.)

The Order is clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually. The Order is not limited to the assets of the alleged partnership, but instead refers directly to Mr. Roos and his ability to satisfy the Judgment. To the extent that this Order directs Mr. Roos to do anything, it is likewise void as being outside the lower court's jurisdiction due to the automatic stay still existing by virtue by Mr. Roos' pending bankruptcy proceeding.

F. COURT MINUTE ENTERED MAY 21, 1991 DENYING THE MOTION TO VACATE JUDGMENT AS TO MR. ROOS, INDIVIDUALLY.

Mr. Roos filed a Motion to Vacate the Judgment and to declare the Judgment as void as to Mr. Roos. The lower court refused to recognize BancFirst's violation of the automatic stay and that the Judgment taken March 1, 1988 was void.

ARGUMENT

PROPOSITION I

THE TRIAL COURT ERRED BY NOT GRANTING APPELLANT'S MOTION TO VACATE JUDGMENT

The Judgment granted in favor of BancFirst is void. See 11 U.S.C. §362. Pursuant to 12 Okla.Stat.Ann. tit. 12, §1038 (West 1988), a void judgment may be vacated at any time.[1] Accordingly, this Court should enter an Order reversing the trial court's denial of Appellant's Motion to Vacate Judgment and hold that the Judgment is void and without effect as it relates to Mr. Roos.

The Oklahoma Supreme Court has recognized that a judicial proceeding in violation of the automatic stay imposed by the Bankruptcy Code provision of 11 U.S.C. §362 is a nullity. See Bailey v. Campbell, No. 74,859, 61 Okla.B.J. 2100 (1991). In Bailey, Charles D. Morrison ("Morrison") filed a bankruptcy petition after a default judgment had been entered against him. Thereafter, Morrison filed a motion to vacate the default judgment which was overruled by the trial court. The denial was affirmed on appeal.

Thereafter, the holder of the default judgment, George Bailey, filed a garnishment action against Morrison's insurance carrier. The carrier, American Casualty Company of Reading, Pennsylvania ("American") filed a motion to quash, objection to jurisdiction and motion to dismiss. American alleged that the automatic stay imposed by Morrison's bankruptcy stripped the trial court of jurisdiction to proceed. American's motion was granted because the automatic stay prohibited Bailey from seeking a garnishment.

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1 12 O.S. §1038 states in pertinent part: ... A void judgment may be vacated at any time, on motion of a party, or any person affected thereby.

Subsequently, Morrison's bankruptcy trustee filed an action to vacate the default judgment. American likewise sought to vacate the default judgment. The trial court denied the relief requested by the Trustee and American.

On Appeal this Court held that: "...judicial proceedings instituted against a debtor in bankruptcy to foreclose a lien are 'entirely ineffective';..." A valid judgment cannot be rendered against a party while it stands protected by an automatic stay. Bailey at 2102. The Supreme Court recognized the automatic stay caused "...judicial proceedings prosecuted in violation of an automatic stay are a nullity...(and that)...post-petition proceedings are a nullity." Bailey at 2103. Accordingly, in Bailey, this Court held that the trial court was "...without authority to proceed."

The March 1, 1988 Judgment is void on its face because the trial court lacked either personal or subject matter jurisdiction. See Martin v. American Farmlines, 790 P.2d 1134, 1136 (Okla. App. 1990); Chamberlin v. Chamberlin, 720 P.2d 721, 725 N. 15 (Okla. 1986). Mr. Roos' filing of a bankruptcy petition submitted himself and his property to the bankruptcy court's exclusive jurisdiction. See Reeves v. Jenkins, 439 P.2d 941 (Okla. 1968); See also 28 U.S.C. 157 and 11 U.S.C. 541.

The Judgment was also outside the scope of the issues presented for determination to the trial court. BancFirst's Motion for Disposition of the Pending Motions for Summary Judgment specifically excluded Mr. Roos from the requested judgment. Nevertheless, the Court entered the Judgment and BancFirst has used it to assert individual liability. The judgment is void as being outside the issues pending before the trial court. See Union Oil Company v. Brown, 641 P.2d 1106, 1108 (Okla. 1981); Bishop v. Franks, 188 Okla. 196, 107 P.2d 358, 359 (1940).

BancFirst's Judgment against this alleged partnership was taken with the knowledge and intent to establish individual liablity against Mr. Roos. Partners are held personally liable for partnership liabilities when partnership

assets are insufficient to satisfy the claimants. A judgment taken against the partnership is the only action necessary to be taken to establish a partner's personal liability when partnership assets cannot satisfy the claimants. See Southard v. Oil Equipment Corporation, 296 P.2d 780 (Okla. 1956); Fowler v. Brooks, 146 P.2d 304 (Okla. 1944).

BancFirst established its claim against Mr. Roos in violation of the stay by taking the Judgment. This was particularly true since the alleged partners of the "Roos Trust, partnership," have always denied the very existence of this ficticious partnership. Therefore, since the existence of such partnership was denied by its alleged partners, then there were obviously no assets available to satisfy this supposed partnership debt. BancFirst used this fictional entity to create a claim against Mr. Roos. See Taylor v. Quinett, 235 P. 214 (Okla. 1975) (a partnership judgment entitles the creditor to satisfy the judgment out of the partnership property, or out of the individual partner's property.) (Emphasis added.)

BancFirst knowingly and willfully violated the automatic stay imposed by virtue of Mr. Roos' bankruptcy filing. In derivation of the stay, Bancfirst obtained the Judgment, and sought execution on the Judgment. In fact, BancFirst used the Judgment to establish its claim against Mr. Roos' bankruptcy estate. This knowing and reckless stay violation renders the Judgment void as a matter of law to the extent that it purports to affect Mr. Roos individually. See 362; Ellis v. Consol. Diesel Elec. Corp., 894 F.2d 371 (10th Cir. 1990) ("any action taken in violation of [automatic] stay is void and without effect").

A stay violation could have been avoided if BancFirst had not sought individual liability against Mr. Roos. The partnership and its partners are separate legal entitles under the Bankruptcy Code. See Matter of Minton Group, Inc., 46 Bankr. 222, 225 (Bankr. S.D.N.Y. 1985) (finding that the bankruptcy debtor, as general partner, and an ownership interest in partnership property, but that the automatic stay did not apply to a creditor's actions when limited solely to

the partnership's property). Nevertheless, BancFirst still maintains that the Judgment created Mr. Roos' individual liability to BancFirst.

In a similar context, the Court in the case of In Re: Metal Center, Inc., 31 Bankr. 458 (Bankr. D. Conn. 1983), addressed the automatic stay in an action against a non-debtor guarantor as to the debtor's obligations. In addressing a creditor's indirect actions taken in frustration of Bankruptcy Code protection, the Metal Court stated:

> ...Where, however, a debtor and a non-debtor are so bound by statute or contract that the liability of the non-debtor is imputed to the debtor by operation of law, then the congressional intent to provide relief to debtors would be frustrated by meriting indirectly what is expressly prohibited in the code...Clearly, the debtor's protection must extend to enjoin litigation against others if the result would be binding upon the debtor's estate.

The Metal Center creditor's attempt to validate its claim against the bankruptcy debtor by proceeding against the guarantor was determined by the Metal Center court to not be bound or effected by such judgment. Specifically, the Metal Center Court stated "...[s]ince he (debtor) cannot be compelled to appear in non- bankruptcy court to defend his creditor's or guarantor's claim, absent relief from the automatic stay, principles of law, which might otherwise bind the debtor, are of no effect in the bankruptcy context."

The filing of a bankruptcy petition invokes an automatic stay which is intended to prevent any actions which may directly or indirectly interfere with the administration of the estate. See 11 U.S.C. 362(a). 11 U.S.C. 362 states in pertinent part:

> (a)...a petition filed under ... this title ... operates as a stay, applicable to all entities, of -
>
> (l) the commencement or continuation, ... of a judicial ... action or other proceeding against the debtor that was ... commenced before the commencement of the case under this title....

It is well established that any action taken in violation of the automatic stay is void and without effect. See Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 346, 84 L.Ed. 370 (1940) ("The action of the ... court was not merely erroneous but was beyond its power, void, and subject to collateral attack.") Obtaining a judgment after the filing of the bankruptcy petition, in a suit which was pending prior to the filing of the bankruptcy petition, is an act which is prohibited by the automatic stay provision. See 11 U.S.C. 362.

The automatic stay remained in effect until Mr. Roos' Chapter 12 bankruptcy was dismissed and closed by the Court's Final Decree of June 20, 1988. See 2 Collier on Bankruptcy 362.06 (15th ed. 1991). Without modifying the automatic stay, BancFirst continued its pursuit of a partnership judgment, which had the effect of an individual judgment against the individual partners to the extent that partnership assets were insufficient to satisfy the claim. BancFirst knowingly sought the Judgment in an attempt to create personal liability as to Mr. Roos. The Motion to Dispose of Summary Judgment specifically referred to its request to create individual liability. Also, the "Roos Trust" partners steadfastly maintained that no such partnership existed. Accordingly, BancFirst knew that the "partnership" held no assets and the Judgment, rendered against this

ficticious entity would effectively create claims against the partners individually.

CONCLUSION

WHEREFORE, premises considered, R. Charles Roos, IV hereby requests that this Court enter an Order reversing the trial court's order denying Appellant's Motion to Vacate Judgment and further holding that BancFirst's March 1, 1988 judgment is void and without effect as to Mr. Roos, awarding Mr. Roos all of his fees and costs, and such other equitable relief as the Court deems appropriate.

JONES, GIVENS, GOTCHER & BOGAN, P.C.

By
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF MAILING

I hereby certify that on the 25th day of November, 1991, I mailed a true and correct copy of the above and foregoing instrument with postage prepaid thereon to:

John B. Axton
P. 0. Box 1488
114 South Broadway
Ada, Oklahoma 74820

KENNETH G.M. MATHER

APPENDIX J

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

BANCFIRST, Appellee,	)	
v.	)	No. 77,768
RUBY LOUISE ROOS TRUST and ROBERT CHARLES ROOS IV TRUST and ELIZABETH ANN ROOS TRUST by and through R. CHARLES ROOS III, Trustee, R. CHARLES ROOS III, Individually, and ROOS TRUST, a Partnership Defendants,	)	
ROBERT CHARLES ROOS IV, Appellant.	)	

APPELLANT'S PETITION FOR CERTIORARI

Appellant, Robert Charles Roos, IV, requests this Court to grant certiorari to the Court of Appeals, Division III, and to vacate the attached opinion of said court, as entered August 25, 1992, and to reverse the final order of the District Court of Murray County, in which his Motion to Vacate Judgment was denied. Rehearing in the Court of Appeals was not sought, in accordance with Court of Appeals Rule 3.13(B)(1).

REASONS FOR REVIEW

The Court of Appeals has decided that, where an action is brought against an alleged partnership, and only one of the alleged partners is served in the action, and that partner commences a voluntary bankruptcy proceeding invoking the statutory stay of all proceedings against him, and during the pendency of the bankruptcy stay a judgment is rendered against the partnership, then the judgment against the partnership may be enforced by levy of execution against the partner individually after the bankruptcy stay is dissolved. The decision on this precise issue presents a substantial question not previously decided by this Court.

The effect of the Court of Appeals decision is that a person who denies that he is a partner in a purported partnership may be bound to satisfy a judgment against the partnership without having been made a party to any action, solely upon the basis that the judgment was taken while the purported partner was under no obligation to defend the action under the federal Bankruptcy Code. This decision is not in accord with applicable decisions of this Court and the United States Supreme Court.

STATEMENT OF MATERIAL FACTS OF RECORD

Plaintiff, Bancfirst, filed this action in 1985, seeking a money judgment on a promissory note signed by the trustee of three trusts. Plaintiff obtained leave to join as additional defendant "Roos Trust, a partnership composed of Ruby Louise Roos Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman."

Plaintiff filed its Amended Petition on April 8, 1986, alleging in Paragraph 1, "That R. Charles Roos III, is the trustee for the Ruby Louise Roos Trust, Robert Charles Roos IV Trust and Elizabeth Ann Roos Trust, all created by the trust instrument dated June 1, 1964, which does business as Roos Trust a partnership composed of Ruby Louise Roos

Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman." Attached as exhibits were promissory notes signed solely by "R. Charles Roos, III, Trustee." An alias summons was issued to "Robert Charles Roos, IV, a partner in Roos Trust, a partnership," and served on April 30, 1986. No other alleged partner was served.

On August 5, 1986, a "Separate Answer of Roos Trust, a Partnership" was filed, in which the trustee's counsel denied the existence of the alleged partnership. The trustee filed a separate answer admitting his individual liability on the notes that he had signed.

On September 29, 1986, plaintiff filed a motion for summary judgment, asking the court to determine "That Roos Trust Partnership composed of Ruby L. Roos, Robert C. Roos IV and Elizabeth A. Roos is liable for the above indebtedness." This assertion was based entirely upon the tax returns signed by the trustee, and upon the trustee's deposition, in which "Roos Trust" is never stated to be a partnership entity. On September 30, 1986, the district court granted judgment against the trustee, denied summary judgment regarding the Roos Trust, and directed the parties to "submit further authorities and amendments to pleadings as to the liability of Roos Trust a partnership." Journal Entry of Judgment filed October 17, 1986.

On February 6, 1987, Robert Charles Roos IV filed a voluntary petition under Chapter 12 of the Bankruptcy Code, invoking the automatic stay of 11 U.S.C. § 362(a). BancFirst never sought or obtained relief from the automatic stay. On December 16, 1987, plaintiff filed a Motion for Disposition of Pending Motion for Summary Judgment, reciting:

> That CHARLES ROOS IV has filed Chapter 12 Bankruptcy in Case No. 97-00148-BKC-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, therefore these actions are stayed as to CHARLES ROOS IV, however, there is no action stayed against the Defendants, RUBY

> LOUISE ROOS WHITTENBURG and ELIZABETH ANN ROOS ENGLEMAN [sic].
>
> . . . .
>
> WHEREFORE, the Plaintiff prays to the Court to rule upon the portions of the Motion for Summary Judgment presently pending as to the determination of liability of the partnership and the individuals, RUBY LOUISE ROOS WHITTENBURG and ELIZABETH ANN ROOS ENGELMAN, liability as partners.

On January 19, 1988 (while Robert Charles Roos, IV, was still in bankruptcy), the district court rendered a judgment that, as memorialized on March 1, 1988, was "against ROOS TRUST, a partnership composed of . . . ROBERT CHARLES ROOS IV."

The bankruptcy case of Robert Charles Roos IV was dismissed on June 20, 1988. On April 25, 1991, after plaintiff attempted to enforce the judgment against Robert Charles Roos IV, the beneficiaries filed a motion to vacate the judgment against the fictitious partnership and themselves as individuals. As stated by plaintiff in its brief on appeal (emphasis added), "On May 21, 1991, the [district court] entered an Order denying the Motion to Vacate as to the Partnership and Robert Charles Roos IV, individually, and vacating the Judgment as it related to Elizabeth Ann Roos Engleman and Ruby Louise Roos Whittenburg due to lack of proper service."

ARGUMENT

I. ASSUMING THAT ROOS TRUST IS A PARTNERSHIP ENTITY, ENTRY OF A JUDGMENT BINDING UPON ROBERT CHARLES ROOS IV AS PARTNER WOULD BE A VIOLATION OF THE BANKRUPTCY STAY AND THUS VOID AS TO THE PARTNER

If the Roos Trust is a partnership entity, then arguably an action pending against the partnership entity may proceed to judgment although one of the partners is in bankruptcy. See, e.g., In re Cardinal Industries, Inc., 105 Bankr. 834 (Bankr. S.D. Ohio 1989); In re Minton Group, Inc., 46 Bankr. 222 (S.D.N.Y. 1985). However, no judgment rendered against the partnership can be valid as against the partner in whose favor the statutory stay of the Bankruptcy Code was effective. See 11 U.S.C. 362(a)(1). Any action taken in violation of the stay is void; only the bankruptcy court may exercise jurisdiction over the debtor. Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S. Ct. 343, 346, 84 L. Ed. 370 (1940).

In Bailey v. Campbell, 62 Okla. B.J. 2100 (Okla. 1991), this Court held that judicial proceedings undertaken in violation of the bankruptcy stay are void. This Court stated in that case, "[A] valid judgment cannot be rendered against a party while it stands protected by an automatic bankruptcy stay." Id. at 2102. "Post-petition proceedings are a nullity whether instituted by the creditor or the debtor. They are not cured by a subsequent termination of the stay. Once the stay issued, the trial court was without authority to proceed." Id. at 2103 (footnotes omitted, emphasis added). The court of appeals decision is thus in conflict with this Court's holding in Bailey, because the court of appeals acknowledged that the bankruptcy stay precluded any binding adjudication against the partner, then improperly concluded that a subsequent termination of the stay caused the prior void adjudication to

be effective against the partner's individual property. This holding is also contrary to the holding in Ellis v. Consolidated Diesel Elec. Corp., 894 F.2d 371, 373 (10th Cir. 1990), in which the court held, "[T]he stay on judicial proceedings made the district court's action void; lifting the stay does not change the character of that action."

In Culie v. Arnett, 765 P.2d 1203 (Okla. 1988), this Court held that an insurer of an employer could not be garnished pursuant to a judgment rendered against an employee, where the employer was to be held liable vicariously but was in bankruptcy when the judgment against the employee was taken. The Court's analysis is dispositive in the instant case.

> Because the employer was not a party to the judgment below, the threshhold question now to be answered is whether [creditor's] judgment against [employee], standing alone, establishes the insured employer's liability for [employee's] negligence and hence triggers its insurer's indemnity obligation. We hold that it does not.
>
> . . .
>
> A valid judgment could not be rendered against the employer while it stood protected by the automatic bankruptcy stay; the employer's liability for its servant's tort and for a debt that might be owed to employer by the insurer has yet to be established. . . .

Id. at 1205, 1207 (emphasis changed). See also Reeves v. Jenkins, 439 P.2d 941 (Okla. 1968) (proceeding in violation of stay in bankruptcy is entirely ineffective). The court of appeals decision is in conflict with this Court's decisions because it gives effect to an adjudication that, under federal law, the district court had no power to render against the partner.

Even if the district court had jurisdiction to enter a judgment against the alleged partnership entity (although lacking in personam jurisdiction over any partner), that judgment can have no effect against Robert Charles Roos, IV, despite any state law that would ordinarily serve to create a vicarious liability against Mr. Roos as a partner with notice of the pending action. For example, in In re Rubenstein, 105 Bankr. 198 (Bankr. D. Conn. 1989), a state court committee for execution sale commenced a proceeding against the mortgagee to recover costs of an aborted judicial sale that was not conducted due to the filing of bankruptcy by the mortgagors. The court noted that under state law the mortgagors would be ultimately liable for the mortgagee's foreclosure costs, but refused to find that the stay was applicable because bankruptcy law precludes any adjudication binding upon the debtor mortgagors.

> A judgment is binding upon a third person who is liable to the judgment debtor when that third person has notice of and an opportunity to defend against the cause of action. Bankruptcy alters that result. . . . Accordingly, I conclude that the debtor would not be bound by any judgment that the [plaintiff] Committee might obtain against the [mortgagee] Bank in state court and that therefore the Bank is not protected by the automatic stay.

Id. at 202 (citation omitted, emphasis added). In a similar case, In re The Metal Center, Inc., 31 Bankr. 458 (Bankr. D. Conn. 1983), the court held that a suit against a guarantor was not prohibited by the automatic stay arising when the principal obligor filed its bankruptcy petition, because the adjudication could not be binding upon the principal obligor under the Bankruptcy Code.

> Generally, the automatic stay does not apply to proceedings against nondebtors. . . . Where, however, a debtor and a nondebtor are

so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code. . . . Clearly, the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate.

. . .

Following the logic that the automatic stay in intended to bar litigation against the debtor and the debtor's estate to collect prepetition debts, and armed with the assumption that the law would not permit an indirect result which was expressly barred, a debtor, on notice of an action by his creditor against his guarantor, might justifiably decline to join that litigation on the basis that the automatic stay must be read to protect him and his estate from being drawn into litigation or from being bound by the results thereof. Since he cannot be compelled to appear in nonbankruptcy court to defend his creditor's or guarantor's claim, absent relief from the automatic stay, principles of law, which might otherwise bind the debtor, are of no effect in a bankruptcy context.

Accordingly, I conclude that the debtor would not be bound by any judgment [creditor] might obtain against [guarantor] in state court, and consequently, [guarantor] is not protected by the automatic stay.

Id. at 462, 463 (emphasis added).

In each case where the issue was presented, the courts have held that a judgment otherwise binding upon another vicariously liable cannot be valid where the party to be held liable was protected by the bankruptcy stay when judgment was entered. The subsequent termination of the stay does not change this result. That rule is dispositive here; thus the motion to vacate the judgment as to Robert Charles Roos, IV, individually, must be granted.

II. THE JUDGMENT CANNOT BE EFFECTIVE TO REACH THE INDIVIDUAL ASSETS OF THE BANKRUPT PARTNER WHO WAS NOT SUBJECT TO THE JURISDICTION OF THE COURT

A valid judgment against a partnership requires service of process upon at least one of the agents of the partnership, such as one of the partners. Southard v. Oil Equip. Corp., 296 P.2d 780 (Okla. 1956). A judgment against a partnership may be satisfied out of partnership property and, if that property is insufficient to satisfy the judgment, then the judgment may be satisfied out of the individual property of any of the individual partners who was subject to the personal jurisdiction of the court. Fowler v. Brooks, 193 Okla. 580, 146 P.2d 304 (1944); Taylor v. Quinnett, 109 Okla. 241, 235 P. 214 (1924).

Even if the judgment against the alleged partnership is valid based upon pre-bankruptcy petition service upon Mr. Roos, the judgment cannot be satisfied out of his individual property. Neither he nor any other partner was subject to the district court's personal jurisdiction when the judgment was taken. A debtor's bankruptcy filing immediately divests all other courts from exercising jurisdiction over him and his property. In re United Church, 74 Bankr. 271 (Bankr. E.D. Pa. 1987). Thus Mr. Roos was in the position of a partner

who had not appeared in the action, and no judgment against the partnership could be satisfied out of his personal assets. Moreover, the district court lacked jurisdiction over the partnership itself since none of the partners were subject to the court's personal jurisdiction.

CONCLUSION

Robert Charles Roos, IV, petitions the Court to grant certiorari, to vacate the opinion of the Court of Appeals, and to vacate the district court judgment.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE,
GOLDEN & NELSON, P.C.

By
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed with proper postage prepaid to counsel of record this ___ day of September, 1992, at the following address:

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Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

(2)

No. 92-1753

In The

Supreme Court of the United States

October Term, 1992

ROBERT CHARLES ROOS IV,

Petitioner,

vs.

BANCFIRST OF SULPHUR, OKLAHOMA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Oklahoma

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does a creditor violate the automatic stay by seeking judgment in state court against a partnership in which a bankruptcy debtor is a general partner, particularly where the creditor expressly notifies the court that the debtor is in bankruptcy and that the action is stayed against the debtor?

2. Can a debtor successfully move to vacate judgment on grounds of alleged stay violations over three years after judgment is awarded when the debtor failed to raise timely alleged violations of the automatic stay in the state court proceeding in which the complained-of judgment is taken, failed to appeal that judgment, and failed to raise timely the alleged stay violations in the bankruptcy court?

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CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The September 30, 1986, judgment of the District Court of Murray County, Oklahoma, is not reported. *See*, Appendices A and B.

STATUTORY PROVISIONS

Rule 13(b) of the Rules for the District Courts of Oklahoma provides:

> If the adverse party or parties wish to oppose the granting of the motion [for summary judgment], they shall serve on the moving party and file with the court clerk within fifteen days after service of the motion a concise written statement of the material facts as to which he or they contend a genuine issue exists and the reasons for denying the motion.

Bankruptcy Code § 350(b), 11 U.S.C. § 350(b), provides:

> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

STATEMENT OF THE CASE

On July 26, 1985, First Oklahoma Bank & Trust Company of Sulphur, Oklahoma, predecessor to Respondent, BancFirst of Sulphur, Oklahoma, ("Respondent") instituted an action in the District Court of Murray County, Oklahoma, ("Murray County Action") seeking to recover

on a promissory note. The initial defendant was Robert Charles Roos III ("Roos III") in his capacity as trustee of the Ruby Louise Roos Trust, the Robert Charles Roos IV Trust, and the Elizabeth Ann Roos Trust ("Trusts"). Roos III had also individually guaranteed the promissory note.

Subsequent discovery revealed that the Roos Trust ("Roos Trust") had received the benefit of the loan proceeds. Roos Trust's federal income tax returns identified its partners as three individuals: Ruby Louise Roos Whittenburg, Robert Charles Roos IV, and Elizabeth Ann Roos Engelman. Based upon this information, Roos Trust was added as a party defendant. At the same time, Roos III was also added as a party defendant based on his personal guaranty.

Roos Trust moved for summary judgment on September 12, 1986, and a hearing was set for September 30, 1986. On September 29, 1986, Respondent filed and served its response to the Roos Trust motion for summary judgment and a cross-motion for summary judgment against Roos Trust and Roos III. At the September 30, 1986, hearing, Respondent was granted judgment on its claims against Roos III individually and in his capacity as trustee. However, contrary to the assertion of Petitioner, summary judgment was not denied as to the liability of Roos Trust. Rather, the court offered the parties the opportunity to submit further authorities and amendments to pleadings on the liability of Roos Trust. Appendix A, at App. 1-App. 2; Appendix B, at App. 5. The additional time permitted Roos Trust the fifteen-day response period established by Rule 13(b) of the Rules for the District Courts of Oklahoma.

On February 6, 1987, Petitioner and his wife filed for relief under Chapter 12 of the Bankruptcy Code. Respondent filed a proof of claim in Petitioner's Chapter 12 case on March 17, 1987, asserting Petitioner's contingent liability for the debt of Roos Trust which Respondent sought to enforce in the Murray County Action.

After Petitioner's Chapter 12 bankruptcy was filed, on December 16, 1987, Respondent filed its "Motion for Disposition of Pending Motion for Summary Judgment" ("Disposition Motion") in the Murray County Action. This was the only action Respondent took in the state court case during the pendency of Petitioner's bankruptcy case. Respondent hoped to obtain judgment against Roos Trust, a partnership which was not in bankruptcy. In the Disposition Motion, Respondent stated:

> That Charles Roos, IV [Respondent] has filed Chapter 12 Bankruptcy in Case No. 87-00148-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, *therefore these actions are stayed as to Charles Roos, IV,* however, there is no action stayed against the Defendants, Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engleman [sic]. (Emphasis added.)

Petitioner's Appendix I, at A-28. Respondent clearly recognized the existence and effect of the automatic stay and that Petitioner was not subject to Respondent's motion for summary judgment.

The Disposition Motion came on for hearing January 19, 1988. Although due notice was given to counsel for Roos Trust, no appearance was made on its behalf. At that hearing, the court entered judgment against Roos

Trust only, not against any individual partner. *See*, Petitioner's Appendix A, at A-1; Petitioner's Appendix B, at A-4.

Petitioner's Chapter 12 bankruptcy case was dismissed, effective February 20, 1988, pursuant to the order of the Bankruptcy Court for the Eastern District of Oklahoma. After the dismissal of Petitioner's Chapter 12 bankruptcy case, Respondent, at the Murray County court's direction, prepared a "Supplemental Judgment" reflecting the Murray County court's findings and judgment at the January 19, 1988, hearing. *See*, Petitioner's Appendix A, at A-1; Petitioner's Appendix B, at A-3-A-4.

To enforce its judgment against Roos Trust, Respondent served an "Order to Appear and Answer as to Assets" ("Order to Appear") on Petitioner. Service was obtained on June 3, 1988.

In discussing the Order to Appear, Petitioner states, in his Brief-in-Chief to the Oklahoma Supreme Court:

> The Order to Appear and Answer as to Assets was directed against Mr. Roos [Petitioner], individually. The Order directed the Private Process Server to notify Mr. Roos to appear as follows:
>
> > To the Defendant, R. Charles Roos, IV, partner of Roos Trust, it appearing to the Court by verified petition that the judgment entered in the above entitled cause has not been satisfied;
> >
> > It is by the Court ordered that *you*, be and appear in person . . . *to answer regarding your ability to respond to the judgment and pay same.*

> *You*, the Defendant, *Robert Charles Roos, IV*, Partner of Roos Trust, *are hereby restrained and enjoined from mortgaging, encumbering, alienating, transferring or otherwise disposing of any property, except reasonable and necessary payment of expenses and indebtedness until further Order of this Court.* (Emphasis added.)
>
> The Order is clear in reflecting BancFirst's [Respondent] intent to pursue its judgment against Mr. Roos, individually. The Order is not limited to the assets of the alleged partnership, but instead refers directly to Mr. Roos and his ability to satisfy the Judgment.

Petitioner's Appendix I, at A-29-A-30.

Petitioner participated in the hearing on assets pursuant to the Order to Appear without raising any objection whatsoever. However, on July 20, 1992, Petitioner filed an action in the United States District Court for the Eastern District of Oklahoma ("Eastern District Action") claiming that Respondent violated the automatic stay by issuing the Order to Appear and holding the hearing on assets. *See*, Appendix C, at App. 10, para. 12, and at App. 12, para. 15. In the Eastern District Action, Petitioner claimed damages from the alleged violation of the stay. *See*, Appendix C, at App. 12, para. 18, at App. 13, para. 22, at App. 13-App. 14, para. 24, and at App. 14, para. 26.

Although the Order to Appear, in Petitioner's own words, was clear as to Respondent's alleged intent to pursue Petitioner individually, Petitioner took no action for three years to remedy the alleged stay violation. Then, on April 25, 1991, Petitioner filed a Motion to Vacate the Supplemental Judgment.

SUMMARY OF THE ARGUMENTS

Respondent did not violate the automatic stay. Respondent's only action in the state court proceeding during the pendency of Petitioner's bankruptcy case was to ask for a ruling on its summary judgment motion against entities not in bankruptcy. In so doing, Respondent specifically advised the state court that Petitioner was protected by the automatic stay. Respondent neither sought, nor obtained, relief against Petitioner.

Even if there had been a stay violation, Petitioner is barred from relief by the equitable doctrines of laches and waiver, due to the delay of over three years between the allegedly offending acts and Petitioner's first request for relief.

Had Petitioner promptly asserted the alleged violation of the stay, Respondent could have taken appropriate action to mitigate the damages, if any, from the alleged stay violation and avoided years of litigation with Petitioner.

ARGUMENT

I.

RESPONDENT DID NOT VIOLATE THE AUTOMATIC STAY

After Petitioner's Chapter 12 bankruptcy was filed, on December 16, 1987, Respondent filed its Disposition Motion in the Murray County Action. Filing this motion was the only action Respondent took in the state court case during the pendency of Petitioner's bankruptcy case.

In the Disposition Motion, Respondent expressly moved for disposition of the case only as against entities not in bankruptcy. Further, Respondent's motion specifically advised the state court of the pendency of the bankruptcy case and the automatic stay's protection of Petitioner. Petitioner lacks even a colorable argument that Respondent violated the automatic stay.

Moreover, the judgment entered was not against Petitioner, but was only against the Roos Trust partnership, which was not in bankruptcy and was not protected by the automatic stay. Thus, the judgment against Roos Trust did not violate the automatic stay.

For bankruptcy purposes, it is well settled that a partnership is an entity separate and distinct from its individual partners. *Liberty Nat. Bank of Roanoke, Va. v. Bear*, 276 U.S. 215, 220, 221, 48 S.Ct. 252, 254 (1928); *In re Aboussie Bros. Const. Co.*, 8 B.R. 302, 303 (E.D.Mo. 1981); *In re Cardinal Industries, Inc.*, 105 B.R. 834, 848-849 (Bankr.S.D.Ohio 1989). Thus, an action may be prosecuted against a partnership even though a general partner is in bankruptcy. *In re Cardinal Industries, Inc., supra*, at 849; *In re Dreske (Dominican Fathers of Winona v. Dreske)*, 25 B.R. 268, 271 (Bankr.E.D.Wis. 1982). The benefits of the automatic stay are clearly restricted to the bankruptcy debtor, and do not extend to other entities who are not in bankruptcy. *See, In re Spencer*, 123 B.R. 858, 860 (Bankr.N.D.Cal. 1991); *Matter of GEC Industries, Inc.*, 116 B.R. 932, 933 (Bankr.D.Del. 1990).

Petitioner cites numerous cases for the proposition that the stay of 11 U.S.C. § 362[1] may, in unusual circumstances, apply to non-debtor third parties. *See,* Petitioner's Writ for Certiorari ("Petition") at 12-13. However, the cases on which Petitioner relies are not applicable here.

In each of the cases on which Petitioner relies, immediately after the offensive act, the debtor moved the bankruptcy court to enjoin the offending action. In none of the cases was there a three-year delay between the offending action and the request for relief.

Moreover, the cases discuss the issue in terms of extending the protection of the stay or enjoining the offending act under the power of § 362. When discussing extension of § 362 to protect non-debtors, the courts do not take the position that the stay has been violated, but rather, that it should be extended to cover the third parties. Consequently, the stay is not automatically in place to prohibit acts against non-debtor third parties; injunctive relief must be specifically extended to cover them.

Finally, several of the cases cited do not rely on § 362 to stay the action against the non-debtor. These cases clearly, and more appropriately, rely on the provisions of § 105 to enjoin certain actions by a creditor against a non-debtor. *See, In re MacDonald/Associates, Inc.*, 54 B.R. 865 (Bankr.D.R.I. 1985) (Request for preliminary injunction; § 362 not involved); *In re Lion Capital Group*, 44 B.R. 690

---

[1] Unless otherwise specified, all statutory references will be to the United States Bankruptcy Code, Title 11, United States Code.

(Bankr.S.D.N.Y. 1984) (Did not involve § 362 but, rather, a request for preliminary injunction); *In re Metal Center, Inc.*, 31 B.R. 458 (Bankr.D.Conn. 1983) (Extension of stay of § 362 not appropriate); *In re Johns-Manville Corp.*, 26 B.R. 420 (Bankr.S.D.N.Y. 1983) (Extended the application of § 362 under authority of § 105.)

Here, there was no violation of the § 362 stay. The Disposition Motion clearly acknowledged that any action against Petitioner was stayed. Moreover, the only judgment entered was against the Roos Trust partnership, not against any of the partners.

II.

PETITIONER'S COMPLAINT OF ALLEGED AUTOMATIC STAY VIOLATIONS IS BARRED BY THE EQUITABLE DOCTRINES OF LACHES AND WAIVER

If there had been stay violations, Petitioner would be barred by the equitable doctrines of laches and waiver from complaining. Equitable principles, such as the doctrines of laches and waiver, apply to claimed violations of the automatic stay. *In re Calder*, 907 F.2d 953, 956 (10th Cir. 1990) ("[E]quitable principles may, in some circumstances, be applicable to claimed violations of the stay."); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984) ("Suspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when

equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems."); *In re Continental Air Lines, Inc.*, 61 B.R. 758, 780 (S.D.Tex. 1986) ("[A] bankruptcy court must be guided by equitable principles in exercising its discretion to enforce or modify the automatic stay."); *In re Downing*, 141 B.R. 748 (Bankr.N.D.Okla. 1992) (Bankruptcy court refused to avoid a post-petition judgment on equitable grounds.).

Petitioner complains that Respondent violated the automatic stay by filing its Disposition Motion on December 16, 1987. Petitioner complains that the Oklahoma Court's judgment of January 19, 1988, violated the automatic stay. Significantly, Petitioner did not raise any suggestion of a stay violation throughout the entire relevant period, either with Respondent's counsel, the state court, or the bankruptcy court.

Petitioner was served with the Order to Appear on June 3, 1988. In accordance with that order, Respondent conducted the hearing on assets. Although Petitioner claims the Order to Appear, "is clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually," Petitioner participated in the hearing on assets and did not complain of a stay violation. Then, approximately three years later, Petitioner began asserting that the judgment was taken in violation of the automatic stay and that the Order to Appear and hearing on assets were violative of the automatic stay.

At least two points are noteworthy. First, Petitioner asserts that the Order to Appear, by its express terms, "is

clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually." Petitioner's Appendix I, at A-30. Consequently, by his own explicit admission, Petitioner had notice of Respondent's alleged intent to enforce the Supplemental Judgment against him in his individual capacity, at the very latest, upon service on June 3, 1988, of the Order to Appear.

Second, this statement was made in Petitioner's brief filed with the Oklahoma Supreme Court on November 26, 1991. In his Petition filed with this Court, Petitioner asserts that he first learned of Respondent's alleged intent to pursue the Supplemental Judgment against him individually at a trial held in January 1991. *See*, Petition at 5. But in November 1991, ten months after the January 1991 trial, Petitioner asserted before the Oklahoma Supreme Court that the Order to Appear served on June 3, 1988, by its own terms, was clear as to Respondent's alleged intent to pursue Petitioner individually. No mention is made in Petitioner's Brief-in-Chief of the revelation of Respondent's alleged intent at the January 1991 trial.

Petitioner has argued throughout this case that Petitioner's bankruptcy case remained operative until June 20, 1988. Actually, the bankruptcy court dismissed the case effective February 1988, and the June 20 date relates to the administrative closing of the case. If the bankruptcy case was pending well after Petitioner, by his own admission, was placed on clear notice on June 3, 1988, of a stay violation by Respondent, Petitioner should have raised the issue in the bankruptcy court.

Even after dismissal of the bankruptcy case, it could have been timely reopened to seek redress for a stay violation. 11 U.S.C. § 350(b). Indeed, eventually, some four years after the bankruptcy case's dismissal, Petitioner unsuccessfully sought to reopen the bankruptcy case for that exact purpose.

If Petitioner had timely asserted the claimed stay violation, Respondent could have taken any appropriate steps to mitigate any damages Petitioner claims to have suffered and protect itself from the ensuing years of litigation with Petitioner over this issue. However, Petitioner "hid behind the log" to see what result related litigation would bring. Only when advantageous for Petitioner did he assert the claimed violation of the stay.

Petitioner's explanation for this three-year delay in acting on the alleged stay violation contradicts his statement regarding the Order to Appear. The reason Petitioner gives for the delay is that he first learned of Respondent's alleged intent at a January 1991 trial. *See*, Petition, at 5. But this statement contradicts his subsequent statement to the Oklahoma Supreme Court that the Order to Appear, "is clear in reflecting BancFirst's intent to pursue its judgment against Mr. Roos, individually."

Due to Petitioner's unexcused delay in asserting the claimed violation of the stay, Petitioner's claims should be denied under the equitable doctrines of laches and waiver, and certiorari should not be granted.

III.

SUMMARY REVERSAL WOULD BE INAPPROPRIATE

Petitioner requests summary reversal of the Oklahoma courts' decisions. However, this relief would be inappropriate.

As previously noted, the issues are not nearly as simple or pristine as Petitioner asserts. A number of questions are relevant. What is the effect of Respondent's express statement in the Disposition Motion that the state court action was stayed against Petitioner? Is it violative of the automatic stay for a creditor to take judgment against a partnership which has a general partner in bankruptcy? What is the effect of a bankruptcy debtor's failure to timely raise an alleged violation of the automatic stay and to "hide behind the log" until it becomes advantageous to the debtor to assert the stay as a sword, rather than the shield the Bankruptcy Code intends it to be?

Without considering and addressing each of these factual and legal issues, meaningful review would be impossible. Accordingly, summary reversal of the Oklahoma courts' decisions would be inappropriate.

CONCLUSION

There was no stay violation. Moreover, if a stay violation had occurred, Petitioner unjustifiably waited three years before requesting relief. Thus, certiorari to the Oklahoma Supreme Court should not issue.

Respondent requests that Petitioner's request for summary reversal be denied and that Petitioner's request for a writ of certiorari to the Supreme Court of the State of Oklahoma be denied.

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APPENDIX A

IN THE DISTRICT COURT

FIRST OKLA. BANK AND TRUST COMPANY OF SULPHUR Plaintiff(s) vs. ROOS TRUST ET AL Defendant(s)	No. C-85-147 (Filed Sep. 30, 1986)

COURT MINUTE

SEPT. 30, 1986

PLTF. APPEARS BY AND THROUGH ITS ATTORNEY, JOHN B. AXTON AND DEFENDANTS APPEAR BY AND THROUGH THEIR ATTORNEY, KENNETH M. SMITH. THE MATTER COMES ON FOR HEARING ON MOTIONS FOR SUMMARY JUDGMENT FILED BY BOTH PARTIES.

THE COURT HAVING REVIEWED THE MOTIONS, AFFIDAVITS, EXHIBITS, DEPOSITIONS AND HEARD ARGUEMENT [sic] OF COUNSEL FINDS PURSUANT TO RULE 13 THAT THE PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT PURSUANT TO PARAGRAPHS 1, 2, 3, AND 4 OF ITS RESPONSE TO AND MOTION FOR SUMMARY JUDGMENT. THE CASE IS STRICKEN FROM ITS PRESENT TRIAL SETTING OF OCTOBER 7, 1986, AND THE PARTIES SUBMIT FURTHER AUTHORITIES AND AMENDMENTS TO PLEADINGS AS TO THE

LIABILITY OF ROOS TRUST A PARTNERSHIP COMPOSED OF RUBY L. ROOS, ROBERT C [sic] ROOS THE IV AND ELIZABETH A [sic] ROOS. PLAINTIFF TO PREPARE THE JOURNAL ENTRY OF JUDGMENT.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED.

/s/ Tim Colbert

APPENDIX B

IN THE DISTRICT COURT WITHIN
AND FOR MURRAY COUNTY

STATE OF OKLAHOMA

FIRST OKLAHOMA BANK & TRUST COMPANY, Sulphur, Oklahoma, a banking corporation,	)	
Plaintiff,	)	Case No. 85-147
v.	)	(Filed
RUBY LOUISE ROOS TRUST, ROBERT CHARLES ROOS IV, TRUST and ELIZABETH ANN ROSS [sic] TRUST, All by the trust instrument dated June 1, 1964, by and through, R. CHARLES ROOS III, Trustee,	)	Oct. 17, 1986)
Defendants,	)	
v.	)	
ROOS TRUST, a partnership composed of RUBY LOUISE ROOS WHITTENBURG, ROBERT CHARLES ROOS IV, and ELIZABETH ANN ROOS ENGELMAN; and R. CHARLES ROOS III, individually,	)	
Additional Party Defendants.	)	

JOURNAL ENTRY OF JUDGMENT

Now on this 30th day of September, 1986, this matter comes on for hearing upon the Motions for Summary

Judgment filed by both parties herein. The Plaintiff appeared by and through its Attorney, JOHN B. AXTON, of the law firm of MAYHUE, AXTON & YOUNGBLOOD and the Defendants appeared by and through their attorney, KENNETH M. SMITH, of the law firm ROBINSON, BOESE & DAVIDSON.

The Court having reviewed the Motions, Affidavits, Exhibits, Depositions and heard argument of counsel finds pursuant to Rule 13 that Plaintiff is entitled to Summary Judgment as follows:

The Court FINDS AND IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that:

1. That the Plaintiff be, and it is hereby, awarded a judgment against the Defendants, R. Charles Roos III as Trustee for Ruby Louise Roos Trust, Robert Charles Roos IV Trust and Elizabeth Ann Roos Trust and R. Charles Roos III a/k/a Robert Charles Roos III, individually, in the principal amount of $318,005.00 as of August 25, 1986; interest in the amount of $66,481.60; interest accruing at the rate of $91.48 per diem; costs of this action of $588.00, for a total judgment of $385.074.60 [sic] with interest thereon at the statutory rate of 15% per annum and a reasonable attorney's fee.

2. That the Defendants, R. Charles Roos II [sic] as Trustee for Ruby Louise Roos Trust, Robert Charles Roos IV Trust and Elizabeth Ann Roos Trust are liable on the note sued upon.

3. That the Court has heretofore found on the 25th day of August, 1986, that the Plaintiff was entitled to judgment against R. Charles Roos III, individually, on his

guarantee in the amount set forth in paragraph "1." above.

4. That the case is stricken from its present trial setting of October 7, 1986.

5. Further, that the parties may submit further authorities and amendments to pleadings as to the liability of Roos Trust a partnership composed of Ruby L. Roos, Robert C. Roos IV and Elizabeth A. Roos.

/s/ Timothy Colbert
JUDGE OF THE DISTRICT COURT

APPROVED:

/s/ John B. Axton
JOHN B. AXTON
MAYHUE, AXTON & YOUNGBLOOD
Attorneys for Plaintiff

/s/ Kenneth M. Smith
Kenneth M. Smith
ROBINSON, BOESE, & DAVIDSON
Attorneys for Defendants

[JE,ROOS/FOBS5]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

ROBERT CHARLES ROOS, IV, Individually, and ROOS RANCH, INC., an Oklahoma Corporation,	)	Case No. _____
Plaintiffs,	)	CIV 92-450-NJ
v.	)	(Filed July 20, 1992)
BANCFIRST-SULPHUR, successor to FIRST OKLAHOMA BANK & TRUST COMPANY OF SULPHUR, OKLAHOMA, Branch of BANCFIRST-OKLAHOMA CITY, OKLAHOMA, Member of BANCFIRST CORPORATION,	)	
Defendant.	)	

COMPLAINT

Plaintiffs, Robert Charles Roos IV and Roos Ranch, Inc., an Oklahoma corporation, hereby file this Complaint against the above referenced Defendant for Defendant's tortious interference with Plaintiffs' business opportunities and business contracts, and through wrongful actions in obtaining a Supplemental Judgment and attempting execution thereon, have tortiously interfered with prospective economic advantage and Plaintiffs' business, and in support, allege and state as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, Robert Charles Roos, IV ("Roos IV") is a citizen and resident of the State of Oklahoma. Roos IV and his wife, Frances M. Roos, were debtors in a Chapter 12 bankruptcy proceeding from February 6, 1987 to June 20, 1988.

Plaintiff, Roos Ranch, Inc., an Oklahoma corporation, is an entity wherein Roos IV is the majority stockholder, owning more than fifty percent of the outstanding stock of the corporation. The remaining stock is owned by Louise R. Whittenburg, of San Antonio, Texas, and Elizabeth R. Engelman, of Wescliffe, Colorado.

2. Defendant, BancFirst-Sulphur ("BancFirst"), is an Oklahoma banking corporation. Its registered service agent is David E. Rainbolt, 101 North Broadway, Oklahoma City, Oklahoma 73102. BancFirst filed a Proof of Claim against the Roos IV bankruptcy estate on March 17, 1987.

3. Accordingly, this Court has jurisdiction and venue over the parties to this proceeding. *See* 28 U.S.C. § 157(b) and § 1334 and 11 U.S.C. § 362.

BACKGROUND OF THE CASE

4. On February 6, 1987, Roos IV filed his voluntary Chapter 12 bankruptcy petition with the United States Bankruptcy Court for the Eastern District of Oklahoma. An automatic stay was imposed against creditors proceeding against the Debtor pursuant to 11 U.S.C. § 362. A Final Decree closing the Chapter 12 proceeding was entered on June 20, 1988.

5. BancFirst originally held a Promissory Note, dated November 2, 1984, from R. Charles Roos, III, as Trustee of three Trusts, known as the Ruby Louise Roos Trust, Robert Charles Roos, IV Trust and Elizabeth Ann Roos Trust. The three Trusts were created by one Trust Agreement, dated June 1, 1964. *See* attached Exhibit A. The Trust Agreement specifically provided that the beneficiaries would not be liable for the acts of the Trustee, BancFirst obtained a judgment against R. Charles Roos, III, individually, and as Trustee of the three Trusts on September 30, 1986 in an action pending before the Murray District Court ("Murray County Action"). *See* attached Exhibit B.

6. BancFirst created a fictional defendant entity for purposes of the Murray County Action. This fictional entity was identified by BancFirst as Roos Trust, a partnership of the three individual beneficiaries of the above referenced Trusts, being Ruby Louise Roos Whittenburg, Roos IV and Elizabeth Ann Roos Engelman. The alleged partners to this fictional partnership have continually denied the very existence of the BancFirst created entity.

7. On March 17, 1987, BancFirst filed a Proof-of-Claim against Roos IV bankruptcy estate, based on the judgment of September 30, 1986 against R. Charles Roos, III, individually, and as Trustee for the three Trusts ("Proof-of-Claim"). *See* attached Exhibit C. BancFirst's Proof-of-Claim, was filed as its claim for individual liability owed from Roos IV to BancFirst.

8. Over a year after obtaining the September 30, 1986 judgment against its only obligors, and while Roos IV's bankruptcy was pending, Bancfirst [sic] filed a

Motion for Disposition of Pending Motion for Summary Judgment, on December 16, 1987, in the Murray County Action. In the Motion, BancFirst sought to obtain judgment against Roos Trust, a partnership of the three individual beneficiaries. The Motion was filed during the pendency of Roos IV's bankruptcy proceeding and provided as follows:

> That Charles Roos, IV has filed Chapter 12 bankruptcy in Case No. 87-00148-BKC-JER in the United States Bankruptcy Court for the Eastern District of Oklahoma, *therefore these actions are stayed as to Charles Roos, IV,* however, there is no action stayed against the Defendants Ruby Louise Roos Whittenburg and Elizabeth Ann Roos Engelman.

Emphasis added.

BancFirst has subsequently admitted that service was never obtained against Ruby Louis Roos Whittenburg or Elizabeth Ann Roos Engelman. Roos IV, the only alleged partner served in this proceedings [sic], was in bankruptcy at this time and protected by the automatic stay of 11 U.S.C. § 362.

9. On January 19, 1988, BancFirst appeared at a hearing before the Murray County District Court and obtained a default judgment aginst the fictional partnership and its alleged partners. No appearance was made for the Defendants at the hearing. In the Minute Order from the hearing, the Court found as follows:

> The Court finds that in fact Roos Trust is a partnership consisting of three individuals, and the three individuals being Ruby Louise Roos Whittenburg, Elizabeth Ann Roos Engelman and

> Robert Charles Roos, IV. The Court therefore grants the Motion for Summary Judgment against said partnership. John Axton to prepare J.E.

See attached Exhibit D.

10. Thereafter, John Axton as attorney for BancFirst, without serving the three individuals, memorialized the January 19, 1988 Minute Order by submitting a Supplemental Journal Entry of Judgment to the Murray County District Court (hereinafter referred to as the "Supplemental Judgment"). *See* attached Exhibit E. The Supplement [sic] Judgment filed March 1, 1988, was not approved by the three individuals, nor their attorneys. Neither the "Minute Order" nor the Supplemental Judgment reflects the lack of service upon Ruby Louise Roos Whittenburg and Elizabeth Ann Engelman, or that any action against Roos IV was stayed by his Chapter 12 bankruptcy proceeding.

11. BancFirst violated the automatic stay of U.S.C. § 362 [sic] by failing to modify the stay prior to obtaining the Supplemental Judgment against Roos Trust, a partnership of the three individual beneficiaries.

12. In a continuing stay violation, BancFirst applied to the Murray County District Court for an Order for Roos Trust to Appear and Disclose Assets as to the Supplemental Judgment. The Order was entered and served on Roos IV during the pendency of Roos IV's bankruptcy proceeding and directed Roos IV, as an individual, to appear as follows:

> To the Defendant, R. Charles Roos, IV, partner of Roos Trust, it appearing to the Court by verified

> petition that the judgment entered in the above entitled cause has not been satisfied, it is by the Court that *you* be and appear in person . . . to answer regarding *your ability to respond to the judgment and pay the same.*
>
> *You* Defendant, Robert Charles Roos, IV, partner of Roos Trust, *are hereby restrained and enjoined from mortgaging, encumbering, alienating, transferring or otherwise disposing of any property except reasonable and necessary payment of expenses and indebtedness until further order of this Court.*

See attached Exhibit F (emphasis added).

13. Thereafter, BancFirst continued its wrongful execution attempts by directing the Murray County District Court Clerk to issue two Writs of Execution, both filed September 27, 1991. *See* attached Exhibits G and H. The Writs are substantially in error as they direct the Murray Country Sheriff to levy execution against the fictitious Roos Trust, a partnership of the three individual beneficiaries and Roos IV, but referred only to the September 30, 1986 judgment which was limited to being against R. Charles Roos, III, individually and as Trustees of the three Trusts. The September 30, 1986 judgment in no way affected either the fictional Roos Trust partnership of the three individual beneficiaries or Roos IV.

14. The Supplemental Judgment of January 19, 1988 taken against Roos IV while he was in a Chapter 12 bankruptcy proceeding, is void and of no effect, as the Murray County District Court lacked personal or subject matter jurisdiction to enter a judgment effecting [sic] Roos IV's rights.

15. BancFirst knowingly and intentionally violated the automatic stay of Roos IV's bankruptcy proceeding by obtaining the Supplemental Judgment. The stay violation was exacerbated by BancFirst's attempted execution of the Supplemental Judgment prior to the closing of Roos IV's bankruptcy proceeding.

16. BancFirst's wrongful refusal to release the Supplemental Judgment against Roos IV, coupled with its Writs of Execution filed September 27, 1991, have caused material, substantial and continuing damages to Roos IV and Roos Ranch, Inc.'s business activities, including but not limited to the inability to acquire cattle operation financing resulting in partial liquidation. Additionally, opportunities were lost by Roos IV and Roos Ranch, Inc. as a result of BancFirst's actions relating to the Supplemental Judgment.

FIRST CAUSE OF ACTION

17. Plaintiffs reallege and restate paragraphs 1 through 16 herein.

18. BancFirst knowingly and intentionally violated the automatic stay of Roos IV's bankruptcy proceeding by taking the Supplemental Judgment and attempting execution thereon. Roos IV is entitled to recover actual and punitive damages and costs including a reasonable attorney fee pursuant to 11 U.S.C. § 362(h).

SECOND CAUSE OF ACTION

19. Plaintiffs reallege and restate paragraphs 1 through 18 herein.

20. BancFirst knowingly and recklessly published its assertion of Roos IV's individual liability on the Supplemental Judgment, and continues to disregard the April 8, 1992 Order of the United States Bankruptcy Court for the Eastern District of Oklahoma, in which BancFirst was ordered to withdraw the Writs of Execution as against Roos IV, as well as to refrain from seeking to enforce the Supplemental Judgment against Roos IV individually (*see* attached Exhibit I), causing continuing harm and damage to Plaintiffs and their businesses, including, but not limited to, lost business opportunities.

THIRD CAUSE OF ACTION

21. Plaintiffs reallege and restate paragraphs 1 through 20 herein.

22. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously damaged, and continue to tortiously damage, Plaintiffs' present and future business opportunities, entitling Plaintiffs to recovery for BancFirst's tortious interference with business opportunities.

FOURTH CAUSE OF ACTION

23. Plaintiffs reallege and restate paragraphs 1 through 22 herein.

24. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously interfered, and continue to tortiously interfere, with Plaintiffs' existing contracts. Plaintiffs are entitled to

recovery for BancFirst's tortious interference with contracts.

FIFTH CAUSE OF ACTION

25. Plaintiffs reallege and restate paragraphs 1 through 24 herein.

26. BancFirst's actions in obtaining the Supplemental Judgment and attempting execution thereon have tortiously interfered, and continue to tortiously interfere, with Plaintiffs' prospective economic advantage.

WHEREFORE, Plaintiffs pray for judgment in their favor and against BancFirst finding that BancFirst's action in obtaining the Supplemental Judgment and the execution thereon were in violation of 11 U.S.C., [sic] § 362, and that BancFirst has tortiously interfered with Plaintiffs' business, business opportunities, contractual relationships, and prospective economic advantage, thereby entitling Plaintiffs to an award as follows:

a. Actual damages in an amount in excess of $1,000,000.00 and punitive damages of $2,500,000.00. [sic]

b. Pre [sic] and post-judgment interest according to law;

c. All costs, including a reasonable attorney's fee; and

d. All other equitable relief which this Court may award under the circumstances of this proceeding.

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

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(3)

Supreme Court, U.S
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No. 92-1753

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

ROBERT CHARLES ROOS, IV

Petitioner

vs.

BANCFIRST OF SULPHUR, OKLAHOMA

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
STATE OF OKLAHOMA

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. BECAUSE THE JANUARY 19, 1988 JUDGMENT ESTABLISHED CONTINGENT LIABILITY AGAINST PETITIONER, IT VIOLATED THE AUTOMATIC STAY

Respondent asserts that because it notified the Murray County, Oklahoma District Court in its December 16, 1987 motion that Petitioner was in bankruptcy, Respondent did not violate the automatic stay. Respondent then asserts that the January 19, 1988 judgment itself did not violate the automatic stay because the judgment was against only the purported partnership and not against Petitioner. Respondent overlooks the key issue. The automatic stay protected Petitioner from any act to collect or assess a pre-petition claim, including contingent liability. 11 U.S.C. §§ 101(5)(A), 362(a)(1), (6); see In re Hemingway Transport, Inc., 954 F.2d 1, 8 (1st Cir. 1992).

Respondent does not contest Petitioner's assertion that Petitioner was still in bankruptcy on January 19, 1988. Respondent does not contest, nor even address, Petitioner's assertion that, under Oklahoma law, the January 19, 1988 judgment established contingent liability against Petitioner while he was in bankruptcy. Finally, Respondent does not contest, nor even address, Petitioner's assertion that the automatic stay barred any act to establish even contingent liability against Petitioner while Petitioner was in bankruptcy.

The cases Respondent cites are distinguishable. In Liberty Nat'l Bank v. Bear, 276 U.S. 215 (1928), it was the partnership, not, as here, the individual partner that was in bankruptcy. Id. at 220.

In both In re Cardinal Indus., Inc., 105 B.R. 834 (Bankr. S.D. Ohio 1989), and In re Dreske, 25 B.R. 268 (Bankr. E.D. Wis. 1982), the plaintiffs were simply seeking to foreclose mortgages on real property owned by the partnerships.

In Cardinal, the court specifically recognized that the plaintiffs were not seeking, as was Respondent here, to obtain judgments against the various partnerships for partnership debts, but rather sought only to foreclose mortgages on partnership properties. 105 B.R. at 849. Even then, the court enjoined the plaintiffs from proceeding with those foreclosure actions which would affect second mortgages the debtor partners had on partnership properties. Id. at 855.

In Dreske, the court stated that while the plaintiffs could proceed with a foreclosure against the partnership's real property, the automatic stay barred any act to collect any deficiency from the debtor partner. 25 B.R. at 268.

II. THE EQUITABLE DOCTRINES OF LACHES AND WAIVER DO NOT BAR PETITIONER FROM SEEKING RELIEF

Respondent does not contest Petitioner's assertion that acts in violation of the automatic stay are void ab initio. Respondent, however, asserts that because Petitioner did not file his motion to vacate the Murray County Court's January 19, 1988 judgment until April 25, 1991, the equitable doctrines of laches and waiver bar Petitioner from claiming that judgment (which was entered while Petitioner was in bankruptcy and protected by the automatic stay) is void and unenforceable as against Petitioner. Respondent further asserts that for this reason, this Court should deny Petitioner's petition for writ of certiorari.

Respondent's assertions are contrary to Oklahoma statute and decisions of the Oklahoma Supreme Court, United States courts of appeals and United States district courts. Moreover, Respondent did not raise the issue of estoppel in the lower courts.

The relevant Oklahoma statute provides that any person affected by a void judgment may seek relief therefrom at any time:

> Proceedings to vacate or modify a judgment or order, for the causes mentioned in paragraphs 4, 5 and 7 of Section 1031 of this title must be commenced within two (2) years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind and then within two (2) years after removal of such disability. Proceedings for the causes mentioned in paragraphs 3 and 6 of Section 1031 of this title, shall be within three (3) years, and in paragraph 9 of Section 1031 of this title, within one (1) year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby.

Okla. Stat. tit. 12, § 1038 (1991).

In Chaney v. Reddin, 205 P.2d 310, 313 (Okla. 1949), the Oklahoma Supreme Court, relying on the last sentence of § 1038, held that the doctrine of laches would not bar a plaintiff from seeking to set aside a void judgment, even though he had waited more than eight years to do so.

The United States courts of appeals and United States district courts which have addressed this issue have similarly held that laches will not bar attack on a void judgment. In re Center Wholesale, Inc., 759 F.2d 1440, 1448 (9th Cir. 1985); Misco Leasing, Inc. v. Vaughn, 450 F.2d 257, 260 (10th Cir. 1971); Austin v. Smith, 312 F.2d 337, 343 (D.C. Cir. 1962); Triad Energy Corp. v. McNell, 110 F.R.D. 382, 385 (S.D.N.Y. 1986); Ruddies v. Auburn Spark Plug Co., 261 F. Supp. 648, 658 (S.D.N.Y. 1966); In re Borek, 180 F. Supp. 567, 568 (D.N.J. 1960). The times between the judgments and the motions to vacate ranged from three and one-half months in Center Wholesale (759 F.2d at 1444) to over four years in Austin (312 F.2d at 343).

While this Court has not directly addressed this issue, it did, in Klapprott v. United States, 335 U.S. 601 (1949), reverse the decision of a United States court of appeals and directed a United States district court to vacate a void judgment (id. at 615-16) even though the petitioner did not seek to vacate the judgment until more than four years after it was rendered. Id. at 603.

Respondent did not raise the doctrine of estoppel in the appellate proceedings below. As a general rule, this Court does not decide questions not raised or resolved in the lower courts. E.g., Taylor v. Freeland & Kronz, 503 U.S. ___, ___, 118 L.Ed.2d 280, 288-89 (1992); Lawn v. United States, 355 U.S. 339, 362-63 n.16 (1958).[1]

---

[1]Even if this Court were to address the estoppel question notwithstanding Respondent's failure to raise it below, an essential element is missing. This Court has stated that "the party claiming the estoppel must have relied upon its adversary's conduct 'in such a manner as to change his position for the worse.'" Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60 (1984). Here, the only detriment Respondent claims from Petitioner's not filing his motion to vacate until April 25, 1991, is that Respondent purportedly could have acted to mitigate any damages Petitioner claims. This assertion overlooks the fact that Petitioner did not seek any damages in this action. Petitioner simply sought to vacate the January 19, 1988 judgment or to obtain a declaration that that judgment was void and unenforceable as against Petitioner.

Respondent's acts also belie its words. On September 27, 1991, Petitioner had a writ of execution issued against Petitioner in the Murray County action to enforce the January 19, 1988 judgment. At that time, Petitioner had already filed a motion to vacate in the Murray County Court and a petition in error and a petition for writ of mandamus in the Oklahoma Supreme Court. In each of these pleadings, Petitioner had claimed the January 19, 1988 judgment was void and unenforceable against him.

III. RESPONDENT ATTEMPTS TO RAISE MATTERS OUTSIDE THE LOWER COURT PROCEEDINGS

Respondent makes reference in its brief to an entirely separate action Petitioner filed against Respondent in the United States District Court for the Eastern District of Oklahoma (the "Eastern District Action") and attached a copy of the complaint as Appendix C. In the event this Court finds there are exceptional circumstances (see Youakim v. Miller, 425 U.S. 231, 234 (1976)) that would justify considering matters which were not part of this case, MCI submits this Court should also consider a number of admissions Respondent made in the Eastern District Action.

Respondent admitted that it sought a determination in its December 16, 1987 motion that Petitioner was a partner of Roos Trust, the purported partnership. Respondent further admitted that it did so to establish contingent liability against Petitioner while he was in bankruptcy.

These admissions are absolutely contrary to the statement in Respondent's brief here that Petitioner purportedly "lacks even a colorable argument that Respondent violated the automatic stay."

CONCLUSION

The January 19, 1988 state court judgment was entered while Petitioner was in bankruptcy and protected by the automatic stay. It is therefore void and unenforceable against Petitioner. Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1940). The doctrine of laches cannot make that judgment valid against Petitioner.

Petitioner therefore respectfully requests that this Court enter an order pursuant to Rule 16.1 summarily reversing the lower court's decision or, alternatively, that this Court grant his petition for writ of certiorari and review the decision of the Oklahoma Supreme Court.

Respectfully submitted,

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